

RECORDATION AND FILING OF UNPATENTED MINING CLAIMS AND SITES WITH THE FEDERAL GOVERNMENT

Cheryl Outerbridge*

Don H. Sherwood**

Under section 314 of the Federal Land Policy and Management Act of 1976 [FLPMA],¹ the Federal Government now requires that unpatented mining claims, mill sites, and tunnel sites be both recorded locally² and filed with the appropriate state-level office of the Bureau of Land Management [BLM].³ Similar dual recording and filing requirements apply with respect to evidence of maintenance of mining claims⁴ annually thereafter. Section 314 has been discussed in detail elsewhere,⁵ and it is not our purpose in this Symposium to repeat what has already been said about the impact of the 1976 Act upon mining and about the implementing regulations originally promulgated by BLM.⁶ Recent amendments and revisions of these regulations, however, effec-

* Associate, Gorsuch, Kirgis, Campbell, Walker & Grover, Denver, Colorado. B.A., magna cum laude, 1968; J.D., 1975, University of Colorado.

** Partner, Dawson, Nagel, Sherman & Howard, Denver, Colorado. B.S., 1960; J.D., cum laude, 1961, University of Nebraska. Adjunct Professor of Natural Resources Law, University of Denver College of Law, since 1964.

1. 43 U.S.C. §§ 1701-1782 (1976).

2. *Id.* § 1744(b) (1976). Recording had been governed prior to the enactment of FLPMA entirely by state law and local regulation under 30 U.S.C. § 28 (1976) and not all states required recordation of all kinds of claims and sites.

3. 43 U.S.C. § 1744(b) (1976). There are two state-level offices for this purpose in Alaska, and the state-level offices for certain states are actually located in other states.

4. The FLPMA adds these requirements only for lode and placer mining claims; the implementing regulations create comparable requirements for mill sites and tunnel sites.

5. Sherwood, *Mining-Claim Recordation and Prospecting Under the Federal Land Policy and Management Act of 1976*, 23 ROCKY MT. MIN. L. INST. 1 (1977); Miller, *Recordation and Surface Management Regulations Affecting Mining in the National Forests, the National Park System, and on the Public Domain*, 23 ROCKY MT. MIN. L. INST. 841 (1977).

6. Effective Jan. 20, 1977, 42 Fed. Reg. 5297 (1977), revising an earlier proposal, 41 Fed. Reg. 54083 (1976).

tive March 16, 1979,⁷ deserve comment. Our purpose here is to discuss the requirements imposed by FLPMA and the regulations as they have just been amended, with reference to the major differences between the original regulations and the recent amendments. It is not our purpose to discuss the arguments as to the authority of the BLM to enact various portions of these regulations, nor the wisdom of some of them. We will also not be discussing those requirements of FLPMA and other laws that pertain only to unpatented mining claims located in National Park System areas.

Before considering specific requirements, there are a few preliminary observations that should be made about the significance of the recordation and filing requirements. First, the filing and recordation requirements imposed under FLPMA and the regulations are in addition to the various requirements imposed under state law relating to the location and recordation of mining claims and sites. Second, the time periods and deadlines set forth in FLPMA and the regulations are being very strictly enforced. The deadlines are not being waived, regardless of good-faith efforts to meet them, and regardless of extenuating circumstances beyond the control of a locator, making compliance difficult or impossible. Third, and perhaps the most significant, is the effect of failure to comply with these filing and recordation requirements. According to both FLPMA⁸ and the regulations,⁹ such failure shall be deemed conclusive as constituting an abandonment of a claim or site. The regulations go on to add that the claim or site is void.¹⁰

Due to the structure of FLPMA and the regulations, there are now, in effect, two classes of unpatented mining claims, mill sites, and tunnel sites: "Old claims" located on or before the effective date of the Act—October 21, 1976—and "new claims" located after that date. For both classes of claims, there are, basically, two sets of filing and recordation requirements: First, the initial filing and recordation of the location certificate or notice of location, and second, the annual maintenance filing requirement in the form of evidence of assessment work or a notice of intention to hold. We will deal with these requirements in order. The initial filing and recordation requirements imposed both for old claims and for new claims are the same, but the applicable time periods within which such filings must be made are different.

7. 44 Fed. Reg. 9719 (1979). A proposed revision of the 1977 regulations had been published for comment almost a year earlier. 43 Fed. Reg. 15101 (1978).

8. 43 U.S.C. § 1744(c) (1976).

9. 43 C.F.R. § 3833.4(a) (1978).

10. *Id.* Why BLM gratuitously expanded upon 43 U.S.C. § 1744(c) (1976), is not clear. An abandoned claim can be relocated by anyone, if the ground is still open to location, and an abandoned claim is not, therefore, void.

Under the revised regulations, the initial filing for old claims, mill sites, or tunnel sites must be made on or before October 22, 1979.¹¹ Under the original regulations this deadline was stated as before October 22, 1979,¹² which meant that the filing would have to have been made on or before October 19, 1979, since October 22, 1979, falls on Monday. But for the fact that it falls on a Sunday this year, October 21 would be the deadline.¹³ The initial filings for new claims or sites must be completed within ninety days after the date of location (not the date of local recordation) of the claim or site.¹⁴

For both old and new claims, mill sites, and tunnel sites, section 314 of the Act requires the owner to file in the appropriate BLM office "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."¹⁵ The regulations, as amended, elaborate upon this statutory requirement to require the owner of an unpatented mining claim or site to file "a copy of the official record of the notice or certificate of location of the claim or site filed under state law."¹⁶ The regulations add that if state law does not require the recordation of a notice or certificate of location of the claim or site, a certificate containing the information specified in the regulations must be filed.¹⁷ Furthermore, if the copy of the official record of the notice or certificate of location does not itself contain all the information specified in the regulations, such information must be supplied in addition to the copy of the official record.¹⁸ To insure compliance with these requirements, one must note that "file" is defined in the regulations to "mean being received and date stamped by the proper BLM office,"¹⁹ and "proper BLM office" means, with one exception, the BLM State Office, and not the District Office, having jurisdiction over the area in which the claims are located.²⁰ The one exception is the Fairbanks District Office in Alaska.²¹

The meaning of "copy of the official record of the notice of location or certificate of location"²² is critical in complying with and in determining the significance of the recordation regulations. This term

11. 44 Fed. Reg. 9722 (1979) (to be codified at 43 C.F.R. § 3833.1-2(a)).

12. 43 C.F.R. § 3833.1-2(a) (1978).

13. *Cf.* 43 C.F.R. § 1821.2-2(e) (1978).

14. 43 C.F.R. § 3833.1-2(b) (1978).

15. 43 U.S.C. § 1744(b) (1976).

16. 44 Fed. Reg. 9719, 9722 (1979) (to be codified in 43 C.F.R. § 3833.1-2(a)).

17. *Id.*

18. *Id.* (to be codified in 43 C.F.R. § 3833.1-2(c)).

19. *Id.* (to be codified in 43 C.F.R. § 3833.1-2(c)).

20. *Id.* (to be codified in 43 C.F.R. § 3833.0-5(g)).

21. 43 C.F.R. § 1821.2-1(d) (1978).

22. 43 U.S.C. § 1744(b) (1976).

is defined in the regulations, and the revised regulations substantially alter the prior definition. The original definition stated:

"Official record of the notice or certificate of location" means the official document of recordation and all accompanying maps, papers or other documents filed for record with the recorder or other officer now authorized to record such instruments under state law in the local jurisdiction where the unpatented mining claim, mill site, or tunnel site is located and any amendments thereof which may change or alter the location of the claim or site.²³

The revised definition now reads:

"Copy of the official record of the notice . . . [or] 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.²⁴

The most significant difference between these two definitions is that the amended definition allows simultaneous filing of the notice or certificate of location with the County Recorder and with the BLM office, whereas the original definition contemplates prior filing in the county. This difference is of primary concern with respect to new claims located after October 21, 1976, because of the ninety-day filing deadline.

Based upon the requirement of section 314 calling for the filing of a copy of the "official record" of the notice or certificate of location²⁵ and upon the definition of "official record" contained in the regulations as originally promulgated,²⁶ the general interpretation of the filing requirement up to now for both new and old claims has been that in order to comply, a locator should file his notice or certificate of location with the county recorder, wait for the county recorder to return the recorded copy with the recording data noted on it, and then file a copy of the recorded notice with BLM. The most cautious attorneys have recommended filing a certified copy of the recorded notice with BLM.²⁷ Where it was not possible to get the recorded copy back from the county recorder in time to make the BLM filing, we have recommended that mining locators at least obtain the date of filing and the

23. 43 C.F.R. § 3833.0-5(i) (1978).

24. 44 Fed. Reg. 9719, 9722 (1979) (to be codified in 43 C.F.R. § 3833.0-5(i)).

25. 43 U.S.C. §§ 1744(a), 1744(b) (1976).

26. See text at note 23 *supra*.

27. See Miller, note 5 *supra*, at 845. But see Sherwood, note 5 *supra*, at 18.

reception number from the county recorder and note this information on the copy of the location notice or certificate prior to filing it with BLM.²⁸

Although the definition of "copy of the official record" has now been revised in the regulations to allow simultaneous filing in the county and with BLM, the original requirement of section 314 for filing with BLM a copy of the official record of the notice or certificate of location remains in effect.

It appears possible that, despite the revised definition in the regulations, filing with BLM of a copy of a notice or certificate of location that has not been recorded with the county recorder²⁹ might be challenged under section 314 as not being a copy of the official record. Therefore, we recommend that, if possible, claimants should continue to file with BLM copies of the recorded location notices or certificates with the county recording data indicated on such copies. While we do not believe that a certified copy is necessary, that would be the ultra-cautious approach to proving the record official. If the recorded copy cannot be obtained in time to make the BLM filing, we would advise noting the county filing data and reception number on the copy to be filed with BLM. If neither of these is possible, of course, simultaneous filing is the only alternative, since the deadline for filing is far more important than the recording data, and, after all, the official record of a claim can just as well mean the certificate or notice prepared by the locator.

The information required in the copy of the notice or certificate of location filed with BLM, or supplied separately if not contained in that copy, has been changed somewhat in the amended regulations. Not all of the specifics need to be reviewed, but it should be noted particularly that the new regulations omit the prior requirement for reference to the county recording data, and that the mapping and description requirements have been revised. Under the old regulations, both maps and narrative descriptions were required;³⁰ now either a map or a narrative description is required.³¹ Note, however, that if a map alone is used, a U.S. Geological Survey topographical map is now required.³²

28. The remainder of the recording data, when obtained, has been supplied by supplemental filing after the ninety-day deadline has passed, in some cases, without BLM's objection. In view of the "or other identification number" alternative to the book and page reference required by the former regulation, 43 C.F.R. § 3833.1-2(c)(2) (1978), this seemed an adequate, if somewhat uncertain, procedure.

29. We use this term to include Alaskan recording districts; there are no counties in Alaska.

30. 43 C.F.R. §§ 3833.1-2(c)(6), (7) (1978).

31. 44 Fed. Reg. 9719, 9722 (1979) (to be codified in 43 C.F.R. § 3833.1-2(c)(6)).

32. *Id.* It is not explained why a locator should be required to use such maps, which are not always available and are not generally reliable, especially as to survey lines and monuments. The locator would be better off to make his own sketch.

The requirement for a \$5.00 service fee per claim or site has been retained, but with the additional comment that any notice or certificate not accompanied by such fee shall not be accepted and shall be returned to the owner.³³ It is now clear that this is a one-time charge, and does not apply to subsequent papers filed with respect to the same claim or site.

The ninety-day limit runs from the date of location, and BLM can do no more than define "date of location" in the regulations, since Congress chose to use those words in section 314.³⁴ The new definition differs substantially from the old one. The original definition read as follows:

"Date of location" means the date indicated on the notice of location or discovery posted on an unpatented mining claim, mill site, or tunnel site under state law, or, if state law does not require the posting of a notice of location or discovery for unpatented mining claims or tunnel sites the date that the notice of location of the claim was posted in accordance with 43 CFR Parts 3830 and 3840 or if state law does not require the posting of a notice for mill sites, the date that the person who located the site began using or occupying the site for mining or milling purposes.³⁵

The revised definition of "date of location" and "located" is simply: "the date determined by State law in the local jurisdiction in which the unpatented mining claim, mill, or tunnel site is situated."³⁶ The impact of this revision is of course yet to be seen, but we suspect that the practical difference may be less than expected.³⁷

Based upon the definition in the original regulations, which basically equated "date of location" with the date of posting notice on the ground, several decisions of BLM offices rejecting late-filed notices have been upheld by the Interior Board of Land Appeals [IBLA].³⁸ It is clear from these cases that, for the purpose of complying with the ninety-day filing requirement, the date of location, as defined under the original regulations, was not the date the last act of location of a claim may have been completed, but was the date indicated on the posted

33. *Id.* (to be codified in 43 C.F.R. § 3833.1-2(d)).

34. 43 U.S.C. § 1744(b) (1976).

35. 43 C.F.R. § 3833.0-5(h) (1978).

36. 44 Fed. Reg. 9719, 9722 (1979) (to be codified in 43 C.F.R. § 3833.0-5(h)).

37. See Ronald Coulam, 35 I.B.L.A. 35, 38 n.1 (1978) *reprinted in* [1978] Gower Fed. Service (Min.) 46.

38. See, e.g., R. Wade Holder, 35 I.B.L.A. 169, 170 (1978) *reprinted in* [1978] Gower Fed. Service (Min.) 56; Foyle Mason, 35 I.B.L.A. 40, 41 (1978) *reprinted in* [1978] Gower Fed. Service (Min.) 40; Ronald Coulam, 35 I.B.L.A. 35, 38 (1978) *reprinted in* [1978] Gower Fed. Service (Min.) 46; Robert Thompson, 34 I.B.L.A. 319, 329 (1978) *reprinted in* [1977] Gower Fed. Service 39; Belton E. Hall, 33 I.B.L.A. 349, 352 (1978) *reprinted in* [1978] Gower Fed. Service (Min.) 17; Northwest Citizens for Wilderness Mining Co., Inc., 33 I.B.L.A. 317, 320-21 (1978) *reprinted in* [1978] Gower Fed. Service (Min.) 15; Southwestern Exploration Assoc., 33 I.B.L.A. 240, 241-43 (1977) *reprinted in* [1978] Gower Fed. Service (Min.) 10.

location notice or in the certificate of location. The argument that the location of a mining claim is a series of acts culminating in the recording of a location certificate in the county records and that, therefore, the ninety-day filing period under section 314 should commence with such date of recording was rejected in cases arising in Wyoming and Nevada.³⁹ In the Wyoming case, the IBLA recognized that while under state law a mining claimant may have some latitude in the expression of the precise "date of location," because of the several acts of location, the existing regulations defining the date of location as the date of posting were controlling;⁴⁰ the IBLA can only interpret the regulations of BLM, not set them aside.⁴¹

The revised regulations now in effect defer to state law for the determination of the "date of location."⁴² It is true, as was unsuccessfully argued in the cases just mentioned, that, under the laws of the various states, a mining claim is not deemed to be validly located until the series of acts of location specified are all completed. These steps typically include the posting of a notice, the marking of the boundaries of the claim or site, and the performance of discovery or validation work (if required under state law). Recording a location notice or certificate in the county records is intended, then, to follow these other steps. In most states, this last step (recording) is not deemed to be one of the essential acts of location, but merely a means of providing constructive notice of the claim to subsequent locators. Therefore, as a general rule, a claim is not deemed located until the last act of location *on the ground* has been completed, but recordation is not considered a necessary element of location. Furthermore, no mining location is deemed valid in the absence of the discovery of a valuable mineral, and if discovery does not occur until after all of the acts of location have been completed, the validity of the location dates only from the date of the discovery. But it is also true that all records of mining claims are required to contain the "date of location,"⁴³ and most states repeat this requirement as information to be included in the posted or recorded location notice.

In some states, for example, California, for the purpose of completing the posted and recorded location notice, the "date of location"

39. Ronald Coulam, 35 I.B.L.A. 35, 37-38 (1978) *reprinted in* [1978] Gower Fed. Service (Min.) 46; Southwestern Exploration Assoc., 33 I.B.L.A. 240, 241-42 (1978) *reprinted in* [1978] Gower Fed. Service (Min.) 10.

40. Ronald Coulam, 35 I.B.L.A. 35, 37-38 (1978) *reprinted in* [1978] Gower Fed. Service (Min.) 46.

41. *Id.*

42. See text & note 36 *supra*.

43. 30 U.S.C. § 28 (1976).

is statutorily equated with the date of posting notice;⁴⁴ in other states, no statutory definition of the term "date of location" is provided.

Typically, the date specified in a recorded location notice as the "date of location" will actually be the date of discovery or the date of posting notice; that is, prospectors naturally select the earliest possible date when they are called upon to supply a date of location in their notices. Seldom, to our knowledge, unless the state statute and the forms in common use ask both for the date of discovery and the date of location, is the date specified in these notices as the "date of location" the date on which the last act of location was completed.

For priority purposes, it has generally been deemed to be in the locator's interest to specify as early a date of location as possible in view of the fact that all competing locators can take advantage of the relation-back rule. Assuming a discovery of a valuable mineral has been made, the rule is that the order of the completion of the necessary acts of location is immaterial. Once all the necessary acts of location are completed, for priority purposes the location dates back to the date of discovery, provided the locator does not delay location beyond the period allowed by state law, in which case an intervening right cuts off the right to complete the location. It would appear that notwithstanding the general principle that a mining claim is not validly located until the last act of location on the ground has been completed, which date may be deemed to be the true "date of location," if a recorded location notice or location certificate specifies a "date of location" that is earlier than the date of the last act, the locator may well be bound by that declaration for the purposes of the BLM recordation requirements.

In fact, one case decided under the original regulations suggests this result.⁴⁵ This case arose in Nevada, and the late-filing mining claimant argued that since the location of his claims was not complete until a location certificate and map were filed in the county recorder's office, the ninety-day period should begin to run from the date of recording, rather than from the date of location specified in his location notices.⁴⁶ In rejecting this argument, the IBLA held that the location of a claim is a distinct event, the date of which must be entered on the location certificate under the relevant Nevada statute,⁴⁷ and the Nevada statute itself utilizes the date of location to initiate a ninety-day period within which recordation in the appropriate county must oc-

44. CAL. PUB. RES. CODE § 2301(d) (West 1972).

45. See *Southwestern Exploration Assoc.*, 33 I.B.L.A. 240, 242 (1977) *reprinted in* [1977] *Gower Fed. Service* (Min.) 10.

46. *Id.* at 241.

47. *Id.*

cur.⁴⁸ Therefore, the date of location stated in the certificate was the date of location for purposes of the BLM recordation requirement. In this case, the IBLA thus did not rely exclusively on the definition of "date of location" in the original regulations as the date of posting. It follows, therefore, that the IBLA viewed state law—even before the amendment of the regulations—to be at least as important as the date of posting. For these reasons, even under the revised definition of "date of location," the locator should be cautioned not to file location notices with BLM that contain a stated "date of location" more than ninety days prior to the date of filing with BLM. In view of the abandonment penalty for failing to comply with the recordation requirements,⁴⁹ it would not be prudent to take chances on a favorable interpretation of the meaning of "date of location" under the revised regulations.

In not one case has the IBLA waived the ninety-day deadline for the recordation of new claims where it has found that a locator failed to meet a statutory command, even in the face of some interesting arguments. These cases were, of course, all based upon the IBLA's interpretation of the original regulations. In one case, it was held that in computing the ninety-day filing period, the date of location is not counted, but the last day of the period is; therefore, where a claim was located on September 1, 1977, a notice which the locator attempted to file with the BLM on December 1, 1977, was one day late and was properly rejected.⁵⁰ In another case, it was held that filing the necessary recordation documents in a BLM District Office the day before expiration of the ninety-day period did not constitute compliance with section 314 and the regulations, since the documents were filed in the wrong place.⁵¹ In another case, the mapping requirement specified in the original regulations was explicitly upheld,⁵² and the BLM was affirmed in its requirement that such maps must be filed as part of the then-effective recordation procedure.⁵³

One locator argued that the delay in filing was due to a mix-up in

48. NEV. REV. STAT. § 517.050-1(c) (1973).

49. 43 U.S.C. § 1744(c) (1976).

50. Robert Thompson, 33 I.B.L.A. 319, 320 (1978) *reprinted in* [1978] Gower Fed. Service (Min.) 39.

51. Irwin W. Sweeney, 34 I.B.L.A. 205, 207-08 (1978) *reprinted in* [1978] Gower Fed. Service (Min.) 31. See text & note 20 *supra*. Whether a district office would always be the wrong place, however, has not yet been decided.

52. See text & note 30 *supra*.

53. Paul S. Coupey, 33 I.B.L.A. 178, 180-81 (1977) *reprinted in* [1977] Gower Fed. Service (Min.) 7. The claimant in this case was given thirty days to cure the defect, which is, perhaps, within BLM's power if the requirement of the regulation is not made mandatory by statute, in which case the decision is correct only if the regulation is valid, if the BLM has no power to add to the command of the statute, and if the map requirement is invalid, the decision is incorrect. If the regulation is valid, however, and compliance both with the statute and the regulations is mandated by the ninety-day deadline, then the allowance of time to cure the defect is incorrect.

the post office;⁵⁴ another argued that his delay was caused by the delay of the county recorder in returning the recorded location notices;⁵⁵ another argued that where claims were located October 22, 1976, the ninety-day filing period expired before the implementing regulations were published in the Federal Register on January 27, 1977;⁵⁶ and several claimants have unsuccessfully argued that their failure to comply with the filing requirements was due to erroneous advice given them by BLM employees.⁵⁷ As is to be expected, none of these arguments has enabled mining locators to obtain a waiver of the ninety-day filing requirement.

Turning now to the annual maintenance filing requirements imposed by section 314 and the regulations, as amended, with respect to mining claims located on or before October 21, 1976, the owner is required to file on or before October 22, 1979, or on or before December 30 of each calendar year following the calendar year of *recording with BLM* the location notice or certificate at BLM, whichever date is sooner, evidence of annual assessment work performed during the preceding assessment year or a notice of intention to hold the mining claim.⁵⁸ With respect to mining claims located after October 21, 1976, however, the owner is required to file on or before December 30 of each calendar year following the calendar year *in which the claim was located* evidence of annual assessment work performed or a notice of intention to hold the mining claim.⁵⁹

Owners of mill and tunnel sites are required by the regulations to file in the proper BLM office on or before December 30 of each year following the year of the initial recording of the site with BLM, a notice of intention to hold the mill or tunnel site.⁶⁰ With respect to notices of intention to hold such sites, filing of these notices with BLM is not required by section 314, and the regulations, furthermore, do not require this notice to be filed locally, but only with the BLM. In addition to these requirements,⁶¹ section 314 requires, with respect only to mining

54. R. Wade Holder, 35 I.B.L.A. 169, 170 (1978) *reprinted in* [1978] Gower Fed. Services (Min.) 56.

55. Southwestern Exploration Assoc., 33 I.B.L.A. 240, 241 (1977) *reprinted in* [1978] Gower Fed. Services (Min.) 10.

56. Northwest Citizens for Wilderness Mining Co., 33 I.B.L.A. 317, 320-21 (1978) *reprinted in* [1978] Gower Fed. Service (Min.) 15.

57. *See id.* at 320-21; Belton E. Hall, 33 IBLA 349, 352-53 (1978) *reprinted in* [1978] Gower Fed. Service (Min.) 17. *Cf.* Irwin W. Sweeney, 34 I.B.L.A. 205, 207-08 (1978) *reprinted in* [1978] Gower Fed. Service (Min.) 31.

58. 44 Fed. Reg. 9719, 9722 (1979) (to be codified in 43 C.F.R. § 3833.2-1(a)).

59. *Id.* (to be codified in 43 C.F.R. § 3833.2-1(c)).

60. *Id.* (to be codified in 43 C.F.R. § 3833.2-1(d)).

61. Note that these requirements are not authorized by FLPMA, but are found in the regulations.

claims, that either a notice of intention to hold the claim or evidence of assessment work must be filed for record in the local jurisdiction and that a copy of the official record of this instrument must be filed with BLM.⁶² Section 314 further requires the instrument filed with the BLM to include "a description of the location of the mining claim sufficient to locate the claimed lands on the ground."⁶³

Evidence of annual assessment work may consist of either an affidavit of assessment work performed⁶⁴ or a detailed report concerning geological, geochemical, or geophysical surveys as provided under the General Mining Law.⁶⁵ The form of instrument to be filed with the BLM is either an exact legible reproduction or duplicate of the affidavit of assessment work performed that was or that will be filed in the local jurisdiction, or an exact legible reproduction or duplicate of the detailed report concerning surveys recorded in the local jurisdiction, in either case setting forth certain additional information.⁶⁶

Although the amended regulations would allow simultaneous filing of the affidavits of assessment work in the local jurisdiction and at the BLM,⁶⁷ the language of the regulations pertaining to detailed reports of geological, geochemical, and geophysical surveys appears to require prior recording in the local jurisdiction.⁶⁸ If it be considered that section 28-1 of Title 30 of the United States Code is incorporated into section 28, recording the report locally may be part of the assessment-work requirement itself, which might explain the difference in language.⁶⁹ In any event, since section 314 of the FLPMA requires a copy of the official record of such instruments to be filed with the BLM,⁷⁰ we would again recommend that, if possible, such instruments be filed in the local jurisdiction first and that a copy of the recorded instrument showing the recording data on it be filed at the BLM within the required time periods.⁷¹ If this is not feasible, we would recommend that the copy filed with BLM contain a reference to the county filing date and reception number. If neither of these is possible, then, at least for affidavits of assessment work, simultaneous filing would be a final alternative.

62. 43 U.S.C. § 1744(a) (1976).

63. *Id.* The original regulations omitted any mention of this statutory requirement.

64. 30 U.S.C. § 28 (1976) provides for assessment work, but forgives failure to perform such work if work is resumed before third-party rights intervene.

65. *See* 30 U.S.C. §§ 28-1, 28-2 (1976).

66. 44 Fed. Reg. 9719, 9723 (1979) (to be codified in 43 C.F.R. § 3833.2-2). Microfilm, however, will not be accepted.

67. *See* text & note 24 *supra*.

68. 44 Fed. Reg. 9719, 9723 (1979) (to be codified in 43 C.F.R. § 3833.2-2(b)).

69. This does not satisfactorily explain, however, how section 314 extended the time to file section 28-1 reports from noon on September 1st to December 30th.

70. 43 C.F.R. § 1744(b) (1976).

71. *See* text at note 29 *supra*.

The amended regulations require the notice of intention to hold a mining claim or group of claims to be in the form of either an exact reproduction or duplicate of a letter signed by the owner of the claim or his agent filed for record in the local jurisdiction, setting forth certain specified information, or in the form of certain evidence relating to deferment of assessment work.⁷² This section of the regulations appears to require prior recording of the notice of intention to hold the mining claim or group of claims in the local jurisdiction, rather than allowing simultaneous filing in the local jurisdiction and at the BLM. For that reason, and since section 314 requires an official record of the notice of intention to hold a mining claim to be filed with the BLM, we recommend prior filing of that instrument in the local jurisdiction, and then filing a copy of the recorded instrument with the BLM within the required time period, or at least noting on the BLM copy the local filing date and reception number.

With respect to mining claims located on or before October 21, 1976, both the notice or certificate of location and evidence of assessment work or a notice of intention to hold must be filed in the proper BLM office on or before October 22, 1979.⁷³ If the notices or certificates of location for these old claims were filed at the BLM prior to the calendar year 1979, then evidence of assessment work or a notice of intention to hold should have been filed on or before December 30 of the following calendar year.⁷⁴ For example, if the location certificate was filed with the BLM during the calendar year 1977, then evidence of assessment work or a notice of intention to hold should have been filed on or before December 30, 1978. On the other hand, if the location certificate was filed with the BLM during the calendar year 1978, or is filed during the calendar year 1979 (on or before October 22), then evidence of assessment work or a notice of intention to hold should be filed at the BLM on or before October 22, 1979.⁷⁵

Another point to note is that with respect to mining claims located after October 21, 1976, the deadline for filing evidence of assessment work or notices of intention to hold is on or before December 30 of each calendar year following the calendar year in which the claim was located, not the year of initial recordation with the BLM.⁷⁶ Determination of the calendar year in which a claim was located for purposes of this filing requirement may be affected by the amended definition of

72. *Id.* at 9719, 9723 (1979) (to be codified in 43 C.F.R. § 3833.2-3(a)). Microfilm, however, will not be accepted. *Id.*

73. *Id.* at 9719, 9722-23 (1979) (to be codified in 43 C.F.R. §§ 3833.1-2(a), 3833.2-1(a)).

74. *Id.* at 9723 (to be codified in 43 C.F.R. § 3833.2-1(a)).

75. *Id.*

76. *Id.* (to be codified in 43 C.F.R. § 3833.2-1(c)).

"date of location" and "located" which is contained in the amended regulations.⁷⁷

Another point is that since the assessment year under the General Mining Law runs from noon, September 1, to noon, September 1,⁷⁸ the filing requirements under section 314 and the regulations, mean that with respect to new claims located between noon of September 1 and midnight of December 31 of any calendar year, evidence of assessment work or a notice of intention to hold must be filed with the BLM on or before December 30 of the calendar year following the calendar year in which located, even though no assessment work is required to be completed during that time period. This means that at least a notice of intention to hold must be filed on or before December 30 in the calendar year next after the calendar year of location, and thereafter, of course, maintenance evidence of some sort must be filed each year. There have been several BLM decisions holding as abandoned, mining claims that were located between noon, September 1, 1976, and December 31, 1976, for which no evidence of assessment work or notices of intention to hold were filed with the BLM on or before December 30, 1977.⁷⁹ The fact that in a few of these cases the mining claimants had relied on erroneous advice by BLM employees to the effect that such filing was unnecessary did not change the results of these cases.⁸⁰

Furthermore, with respect to these maintenance filing requirements one must note that the filing deadline of "on or before December 30" means that in a state such as Colorado, which allows affidavits of assessment work to be recorded for up to six months after the end of the assessment year,⁸¹ to comply with the BLM filing requirement, the state filing will have to be made earlier than would otherwise be necessary. The state filing must be made in sufficient time in order to obtain a copy of the official record thereof to be filed at the BLM office on or before December 30, or at least to obtain the county filing date and reception number to note on the copy to be filed with the BLM. Of course, the federal act requires, in section 314(a)(1), that the local recording be completed by December 30.

One further provision deserves mention. Section 314(a) requires, with respect to mining claims, that the annual maintenance filing at the BLM shall include "a description of the location of the mining claim

77. *Id.* at 9723 (to be codified in 43 C.F.R. § 3833.0-5(h)). See text at notes 35-48 *supra*.

78. 30 U.S.C. § 28 (1976).

79. See Paul S. Coupey, 35 I.B.L.A. 112, 115-16 (1978) *reprinted in* [1978] Gower Fed. Services (Min.) 51; Ronald L. Nordwick, 36 I.B.L.A. 238, 240 (1978) *reprinted in* [1978] Gower Fed. Services (Min.) 85.

80. See cases cited at 79 *supra*.

81. COLO. REV. STAT. § 34-43-114 (1973).

sufficient to locate the claimed lands on the ground.”⁸² Such a description is not normally contained in affidavits of assessment work filed locally. Furthermore, the statutory requirement appears to be totally unnecessary, since such a description is also required to be contained in the location certificate or notice which normally will have been filed at the BLM prior to the filing of any notice of intention to hold or evidence of assessment work. The new regulations recognize this, to some extent, by providing that when filing evidence of assessment work or notices of intention to hold mining claims, the furnishing of the BLM serial number assigned to each claim at the time of the initial recordation will satisfy the requirement of section 314 for a complete description.⁸³ This provision, however, appears only in the sections of the regulations pertaining to affidavits of assessment work and notices of intention to hold mining claims.⁸⁴ It is not included in the section pertaining to filing of detailed reports of geological, geochemical, and geophysical surveys.⁸⁵ Therefore, if such a detailed report is filed at the BLM, we would recommend that a complete description of the claims be furnished.

It should be noted that no BLM serial number will be available in cases where location notices and evidence of assessment work or notices of intention to hold are filed simultaneously with BLM. This situation is likely to arise in meeting the recordation and maintenance filing requirements for old claims prior to the October 22, 1979, deadline. In these cases, or in any case where a BLM serial number is not available, the evidence of assessment work or notice of intention to hold to be filed at the BLM should include the complete description of the claim as required by section 314.⁸⁶

A number of revisions have been made in the amended regulations, with respect to the required content of notices of intention to hold mining claims, mill sites, and tunnel sites. For the most part, the revisions appear to have eliminated many of the errors and problems contained in the original regulations with respect to these notices. The regulations also contain special provisions for those old claims or mill sites for which patent applications have been filed on or before October 22, 1979.⁸⁷

82. 43 U.S.C. § 1744(a) (1976).

83. 44 Fed. Reg. 9723 (1979) (to be codified in 43 C.F.R. §§ 3833.2-2(a)(1), 3833.2-3(a)(1)(i)).

84. *Id.*

85. *Id.* (to be codified in 43 C.F.R. § 3833.2-2(b)).

86. The failure of the regulations adequately to anticipate and deal with this problem does not obviate the need to meet the mandatory requirement of 43 U.S.C. § 1744(a) (1976).

87. 44 Fed. Reg. 9719, 9723 (1979) (to be codified in 43 C.F.R. §§ 3833.1-3, 3833.2-4). In the few situations in which these regulations apply, special attention should be devoted to the question of whether these regulations are valid, but that is beyond the scope of this article.

In addition to the initial recordation requirement, and the annual maintenance filing requirement, the regulations impose a further filing requirement: That the BLM be notified of any transfers of interest in a claim, mill site, or tunnel site, that has been previously recorded with the BLM.⁸⁸ This information is required to be filed within sixty days after completion of the transfer.⁸⁹ Unlike the other filing requirements, however, the effect of failure to comply with this requirement is not the conclusive abandonment of the claim. Rather, in the event of any action or contest affecting a claim, the regulations provide that only those owners who have recorded their claims or sites and filed notices of transfer of interest will be personally notified of the action or contest.⁹⁰ Until the validity of this regulatory requirement is determined, it would be in the interest of all transferees to comply with this filing requirement.

88. 43 C.F.R. § 3833.3 (1978).

89. *Id.*

90. 44 Fed. Reg. 9719, 9724 (1979) (to be codified in 43 C.F.R. § 3833.5(d)).

