

DAVID DOREMUS

IBLA 89-244

Decided August 9, 1990

Appeal from a decision of the Idaho State Director, Bureau of Land Management, denying petition for deferment of annual assessment work for various lode mining claims and tunnel sites. I-26581.

Affirmed.

1. Mining Claims: Assessment Work

A petition for the deferment of assessment work may only be granted pursuant to 30 U.S.C. § 28b (1982) where "legal impediments" exist which affect the right of the mining claimant to enter upon the land or gain access to the boundaries thereof. A court injunction which precludes a claimant from any mining activities in a wilderness area without the approval of the Forest Service does not constitute a legal impediment, even if it were applicable to the claims for which deferment were sought, since such an order is not a legal impediment to entry upon the claims; rather, it imposes a condition precedent to undertaking mining activities.

2. Mining Claims: Assessment Work--Mining Claims: Tunnel Sites

Under 30 U.S.C. § 28b (1982), the annual assessment work requirement imposed by 30 U.S.C. § 28 (1982) may be deferred by the Secretary of the Interior as to any mining claim or group of claims upon the necessary showing being made. The deferment statute is inapplicable to tunnel sites because they are not mining claims and because no annual assessment work for tunnel sites is dictated by 30 U.S.C. § 28 (1982).

APPEARANCES: Wilbur T. Nelson, Esq., Boise, Idaho, for appellant.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

David Doremus has appealed from a January 3, 1989, decision of the Idaho State Office, Bureau of Land Management (BLM), denying a petition

for deferment of assessment work for 22 lode mining claims and 7 tunnel sites located in the Nez Perce National Forest administered by the Forest Service, United States Department of Agriculture. See Appendix A. Certain of the claims are located entirely or partially within the Gospel-Hump Wilderness. BLM denied the petition as it related to the lode mining claims on the basis that Doremus had failed to establish that there was a legal impediment which affected his right to enter upon the surface of the claims, and it denied the petition as it related to the tunnel sites because a requirement to perform annual assessment work on a tunnel site does not exist in the mining law. We affirm.

The record discloses that in August 1987 Doremus located the claims and tunnel sites in question. Thereafter, in October 1987, he filed with the Forest Service separate plans of operations for each of the five groups of lode claims, and in January 1988, he submitted four additional plans of operations covering proposed exploration activities on the seven tunnel sites. The Forest Service determined that the plans were incomplete, and it requested changes and additional information from Doremus. In an August 26, 1988, letter to Doremus, regarding assessment work on the lode claims, the Forest Service stated:

As stated in my August 18 letter to you it is not our intention to stop you from completing your required assessment work, however, you should not conduct any significant surface disturbing work until we complete the required environmental analysis and approve your Plans of Operations.

I would like to recommend that you look into other alternatives to using mechanized equipment to complete your assessment work until you have an approved Plan of Operations. [1/]

On September 28, 1988, Doremus filed with BLM an "assessment exemption request" for the claims and sites in question, as part of a notice of intention to hold. By letter dated October 12, 1988, BLM informed Doremus of the specific requirements for filing a petition for deferment of assessment work, stating that assessment work is not required by law for tunnel sites and that a deferment could not be granted for such sites. It also cited Doremus to specific Board decisions involving petitions for deferment of assessment work.

On November 21, 1988, Doremus filed his petition for the lode claims and tunnel sites, requesting "deferment of our required assessment and tunnel work as we have diligently attempted to obtain USFS permission for over a year to perform our required work and although some progress has been made, we have yet to receive USFS authorization to do that which we are required by statute to do." He also included a brief history of his actions regarding the claims since their location.

1/ In an Aug. 30, 1988, letter to Doremus, the Forest Service again reminded him that alternatives existed to using mechanized equipment to complete his assessment work.

On December 23, 1988, in response to a request from BLM for copies of relevant information concerning the claims, the Forest Service forwarded to BLM correspondence between it and Doremus dating from September 21, 1987, through August 30, 1988; a Decision Notice and Finding of No Significant Impact, dated November 7, 1988, approving Doremus' plans of operations with 17 mitigating measures and requiring 13 changes for activities in the Gospel-Hump Wilderness; and the supporting Environmental Assessment.

In its January 3, 1989, decision, BLM reviewed that Forest Service correspondence and denied the petition.

On appeal, Doremus claims that he was denied due process because BLM sought information from the Forest Service which amounted to an ex parte communication. He states that by basing its decision on that information, BLM, in essence, conducted a hearing without his attendance and without the opportunity to rebut or refute that information. This argument has no merit.

The material forwarded by the Forest Service to BLM constituted largely correspondence between Doremus and the Forest Service, which is all official Government records, of which Doremus had notice as the sender or recipient. He can hardly complain that he had no opportunity to refute any statement made therein. In addition, Doremus overlooks the fact that there was no official proceeding pending before BLM to which any ex parte prohibitions might attach. Compare 43 CFR 4.27(b).

Finally, and most importantly, while the Forest Service materials provide the background for Doremus' dispute with the Forest Service regarding approval of his plans of operations, BLM's decision, as does ours, turns on whether Doremus made the necessary showing required by the Act of June 21, 1946, 30 U.S.C. § 28b (1982), which provides:

The performance of not less than \$100 worth of labor or the making of improvements aggregating such amount, which labor or improvements are required under the provisions of section 28 of this title to be made during each year, may be deferred by the Secretary of the Interior as to any mining claim or group of claims in the United States upon the submission by the claimant of evidence satisfactory to the Secretary that such mining claim or group of claims is surrounded by lands over which a right-of-way for the performance of such assessment work has been denied or is in litigation or is in the process of acquisition under State law or that other legal impediments exist which affect the right of the claimant to enter upon the surface of such claim or group of claims or to gain access to the boundaries thereof.

See 43 CFR 3852.1. BLM determined that Doremus failed to show the existence of a legal impediment. 2/

2/ Doremus raises a number of arguments directed to the alleged deficiencies in the operating plan approval process of the Forest Service. Those arguments are irrelevant to whether Doremus made the necessary

[1] The purpose of the statute is to protect a claimant whose right of access to his mining claim has been denied or impeded. John W. MacGuire, 35 IBLA 117, 118 (1978). In order to satisfy the statutory requirements, a claimant must show conditions exist which deny or impede the right of access to the claim. Lyra-Vega II Mining Association, 91 IBLA 378 (1986). In a number of cases, the Board has emphasized that a deferment may only be granted where "legal impediments" exist which affect the right of the claimant to enter upon the surface of the claims and physical access to the claims has been precluded. Minerals Engineering Co., 71 IBLA 402 (1983); A. J. Maurer, Jr., 36 IBLA 4 (1978); Oliver Reese, 34 IBLA 103 (1978).

The Board has held that the fact that trespass charges have been threatened is not itself a legal impediment sufficient to warrant a deferment. Portland General Electric Co., 29 IBLA 165 (1977). However, a claimant was entitled to a deferment where the National Park Service physically barred entrance to the claims by no-trespassing notices, barricades, and threats of criminal prosecution. American Resources, Ltd., 44 IBLA 220 (1979). An injunction precluding a claimant from entry on the claim constitutes a legal impediment. Continental Oil Co., 36 IBLA 65 (1978).

Doremus asserts that in this case a preliminary injunction exists which justifies a deferment and he encloses a copy of an October 28, 1988, order rendered by the United States District Court for the District of Idaho in United States v. Doremus, No. 88-3105, in which the court enjoined mining activities in the Gospel-Hump Wilderness. 3/ That order does not create a legal impediment within the meaning of the statute.

The court states at page 2 of its order:

At issue in this case are some one hundred twenty-six areas in the Gospel-Hump Wilderness. Twenty-three of these areas have been marked by Doremus as placer claim sites, and one hundred three of them have been marked as "tunnel claim" sites.
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The first Operating Plan for the areas at issue was submitted on September 19, 1988. This plan covers the one hundred twenty-six proposed claim sites.

This description of the claims at issue in the order does not comport with the claims involved in this case. The mining claims covered by the

fn. 2 (continued)

showing required by the deferment statute, and will not be considered. He requested a hearing, pursuant to 43 CFR 4.415, on issues raised by such arguments. That request is denied.

3/ In the same order in the consolidated case of Doremus v. United States, No. 88-3105, the court denied Doremus' request that the Govern-ment be enjoined from interfering with his mining activities.

petition are lode claims, while the court states that the claims it considered were placer mining claims. Therefore, it is arguable that the injunction does not relate to the claims in question because the mining claims before the court were not the same as those before us.

In addition, while the tunnel sites are not described in the court's order, it does state that they were included in a plan of operations submitted September 19, 1988. The tunnel sites under consideration here are included in plans of operations dated January 1988. However, whether or not the tunnel sites were included in the order is of no moment for one overriding reason, as explained below, deferment of assessment work is not available for tunnel sites.

Assuming the injunction were applicable to the claims at issue, it does not serve as a legal impediment to Doremus' entry upon or access to his claims. ^{4/} At page 6 of its order, the court quotes from the Forest Service regulation at 36 CFR 228.5(b) (1988):

Pending final approval of the plan of operations, the authorized official will approve such operations as may be necessary for timely compliance with the requirements of Federal and State laws, so long as such operations are conducted so as to minimize environmental impacts

And the court states that:

The Forest Service has agreed to allow Doremus to carry out some mining operations. Both sides gave their assurances in open court that they would work out a suitable plan to allow operations pending approval of Doremus's proposed plan, and this court has faith that they will do so. [Emphasis added.]

Thus, the injunction explicitly provides that Doremus may conduct operations on his claims and sites. It does not preclude entry or access; rather, it imposes a condition precedent to undertaking mining activities--Forest Service approval. To the same extent, the portion of the Forest Service letter of August 26, 1988, quoted above, shows, with specificity as to the lode claims in question, that access to the claims was not denied and that assessment work could go forward. ^{5/}

^{4/} One could argue, given the broad scope to the court's conclusion that Doremus and others were "ENJOINED from conducting any mining activities in the Gospel-Hump Wilderness area unless and until permission to conduct such activities is obtained from the United States Forest Service" (Order at 7), that the injunction applies to those claims and sites included in the petition which are entirely or partially located in the Gospel-Hump Wilderness.

^{5/} What may be gleaned from the record in this case is that Doremus wanted to proceed with the work described in his plans of operations prior to their approval, and would settle for nothing less. That is not a basis for approving a petition for deferment of assessment work.

[2] Finally, Doremus states that he realizes that there is no "assessment work" requirement for tunnel sites and that he did not request deferment of such in his petition; rather, he sought deferment of "tunnel work" and the "commencement of tunnel sites and six month diligent prosecution requirement." ^{6/} He recognizes that there is no express provision for deferment of tunnel work; nevertheless, he argues that since there is an annual requirement of diligence indistinguishable in purpose from the assessment work requirement, but for the quantification requirement, diligent prosecution on a tunnel site is equally deferable under the defer-ment statute.

The deferment statute provides that the annual assessment work requirement of 30 U.S.C. § 28 (1982) "may be deferred by the Secretary of the Interior" for "any mining claim or group of claims." (Emphasis added.) Tunnel sites are not mining claims. Creede & Cripple Creek Mining & Milling Co. v. Unita Tunnel Mining & Transportation Co., 196 U.S. 337, 357 (1905). Therefore, 30 U.S.C. § 28b (1982) is inapplicable to tunnel sites. Also, the deferment statute specifically refers to the annual assessment requirement imposed by 30 U.S.C. § 28 (1982). The requirement to prosecute work on a tunnel site is dictated by 30 U.S.C. § 27 (1982), not 30 U.S.C. § 28 (1982).

Even if we were to accept Doremus' argument, he would be faced with the same "legal impediment" requirement discussed above and the petition would be denied for the reasons set forth above.

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.

Bruce R. Harris
Administrative Judge

I concur:

John H. Kelly
Administrative Judge

^{6/} The tunnel site statute, 30 U.S.C. § 27 (1982), provides:

"Where a tunnel is run for the development of a vein or lode, or for the discovery of mines, the owners of such tunnel shall have the right of possession of all veins or lodes within three thousand feet from the face of such tunnel on the line thereof, not previously known to exist, discovered in such tunnel, to the same extent as if discovered from the surface; and locations on the line of such tunnel of veins or lodes not appearing on the surface, made by other parties after the commencement of the tunnel, and while the same is being prosecuted with reasonable diligence, shall be invalid; but failure to prosecute the work on the tunnel for six months shall be considered as an abandonment of the right to all undiscovered veins on the line of such tunnel."

APPENDIX A

<u>Claim Name</u> #	<u>IMC #</u>	<u>Claim Name</u>	<u>_____</u>
Seperation Tunnel #1 124697	124683	Rubylake Tunnel #1	
Seperation Tunnel #2 124698	124684	Rubylake Tunnel #2	
Seperation #1 124699	124685	Rubylake #1	
Seperation #2 124700	124686	Rubylake #2	
Seperation #3 124701	124687	Rubylake #3	
Seperation #4 124702	124688	Rubylake #4	
Seperation #5 124703	124689	Rubylake #5	
Seperation #6 124704	124690	Rubylake #6	
Munchkin #1 124705	124691	Deerlake Tunnel #1	
Munchkin #2 124706	124692	Deerlake Tunnel #2	
Munchkin #3	124693		
Munchkin #4 124707	124694	Humpview Tunnel	
Rubyslipper #1 124708	124695	Humpview #1	
Rubyslipper #2 124709	124696	Humpview #2	
124710		Humpview #3	
124711		Humpview #4	