

HORACE S. WILSON

IBLA 89-125

Decided October 3, 1991

Appeal from a decision of the Montana State Office, Bureau of Land Management, denying petitions for deferment of annual assessment work for various placer mining claims. M MC 41687 through M MC 41699.

Affirmed.

1. Mining Claims: Assessment Work

BLM properly denies a petition for deferment of performance of annual assessment work where closure by the Forest Service of an area of a national forest due to a fire did not preclude access to the affected mining claims for the purpose of performing assessment work because the closure was not applicable to persons with permits and there was no evidence in the record that appellant sought a permit from the Forest Service and was denied one.

APPEARANCES: Horace S. Wilson, Helena, Montana, pro se.

OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

Horace S. Wilson has appealed from a decision of the Montana State Office, Bureau of Land Management (BLM), dated November 3, 1988, denying his petitions for the deferment of performance of annual assessment work for the 1988 assessment year with respect to 13 placer mining claims, M MC 41687 through M MC 41699. ^{1/}

The subject mining claims were located between July 25 and October 13, 1974, in secs. 21 through 24, 27, 28, 32, and 33, T. 7 N., R. 2 W., Principal Meridian, Jefferson County, Montana, within the Helena National Forest. Notices of location of the claims were filed for recordation with BLM on October 9, 1979.

On September 22, 1988, Wilson filed two petitions for deferment of the performance of annual assessment work for the 1988 assessment year

^{1/} Wilson filed two petitions. One related to four claims, the Patricia #1 (aka the Patricia) and #2 and the Valerie #1 and #2, and the other to nine claims, the Patricia #4 through #7 and the Valerie #1 through #5, and the Valerie #7 and #8.

(beginning September 1, 1987, and ending September 1, 1988) with respect to the subject mining claims. He sought deferment because the "[h]igh fire danger in the Elkhorn Mountain Area * * * is preventing access to the above claim[s]." 2/

By letter dated October 18, 1988, BLM requested the Regional Forester, Region 1, to verify that "the claimant was unable to perform the annual assessment work due to conditions beyond his control, in that the lands were closed due to fire danger."

On November 2, 1988, the Regional Forester advised BLM:

The closure order prohibited high fire risk activities and sought to keep the general public on the roads. It did not apply to people with permits or approved operating plans. Mr. Wilson could have submitted a Notice of Intent or Plan of Operations for his assessment work, but he did not.

A fire burned over part of the area August 9 to September 3, creating an emergency situation where access was not allowed. The rest of the year he had [the] opportunity to do assessment work. 3/

In its November 1988 decision, BLM denied Wilson's petitions because, "even though the closure order prohibited high fire risk activities, it did not apply to people with permits or approved operating plans." Wilson filed a timely appeal.

In his statement of reasons for appeal (SOR), appellant contends that BLM improperly denied his petitions for deferment of annual assessment work.

2/ Along with his petitions, Wilson submitted a copy of a document entitled "SPECIAL RESTRICTIONS," signed by the Forest Supervisor, Helena National Forest, on July 29, 1988. This document prohibited, except in certain instances, "on all National Forest lands of the Helena National Forest," campfires, smoking, the use of equipment with internal combustion engines, welding and blasting operations "and other activities with high potential for causing forest fires," and the off-road use of motorized vehicles. Excepted from the restrictions, however, were "persons with permits." The restrictions were to take effect Aug. 1, 1988, and remain in effect "until rescinded or revoked."

3/ On appeal, Wilson submitted a copy of a document entitled "SPECIAL RESTRICTIONS," signed by the Forest Supervisor, Helena National Forest, on Aug. 16, 1988, closing an area of the Elkhorn Mountains to "public access and use." Generally excepted from the order were "persons with permits." The closure was to take effect Aug. 16, 1988, and remain in effect "until * * * rescinded or revoked." The document did not specifically state the reason for the closure; however, based on the Regional Forester's letter received by BLM on November 2, 1988, it may be presumed that the closure was due to a fire having broken out in the Elkhorn Mountains.

He asserts that he has delayed completing assessment work until August of each year because "road and weather condition[s] prevent access by 4-wheel drive vehicle during most of the year" and that he could not have foreseen that, in August 1988, fires would preclude access to the area of the subject mining claims during the final weeks of the 1988 assessment year. *Id.* at 2. Appellant concludes that he is entitled to the deferment, in accordance with 43 CFR 3852.1, where, under these circumstances, he was unable to gain access to the mining claims.

[1] Section 1 of the Act of June 21, 1949, 30 U.S.C. § 28b (1988), provides that the performance of annual assessment work, as required by 30 U.S.C. § 28 (1988), may be deferred by the Secretary

upon the submission by the claimant of evidence satisfactory to the Secretary that [the] mining claim * * * 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 to gain access to the boundaries thereof. [Emphasis added.]

See also 43 CFR 3852.1; Lyra-Vega II Mining Association, 91 IBLA 378, 381 (1986).

It has long been held that, in order to be entitled to the temporary deferment of the performance of annual assessment work, the petitioner must demonstrate that there is a "legal impediment" which affects his "right" to enter upon the surface of the claim and physical access to the claim has been precluded. See David Doremus, 115 IBLA 336, 339 (1990), and cases cited therein.

We conclude, for the following reasons, that appellant has failed to satisfy the well-established prerequisites of 30 U.S.C. § 28b (1988) for granting such deferment. ^{4/}

In his petitions, appellant made no reference to the August 16 closure order as justification for his request. Rather, he cited the "danger" of fire in the Elkhorn Mountains area, which encompasses the subject mining claims, and submitted a copy of the July 29 document issued by the Forest Supervisor. That document indicated that the Forest Service was concerned, during the late summer of 1988, about the possibility of fires in the Elkhorn Mountains area of the Helena National Forest and determined that it was necessary to prohibit certain activities that had the potential for causing fires. The order, however, did not prevent appellant from obtaining access to the surface of the subject mining claims. Nor did it preclude the

^{4/} Since we reach such a conclusion, we need not determine whether appellants' petitions, filed on September 22, 1988, following the conclusion of the 1988 assessment year, were timely.

performance of all forms of assessment work or all mining activity. 5/ Thus, the July 29 order does not constitute a proper basis for the deferment of assessment work. See Roger D. Schoonover, 102 IBLA 318, 320-21 (1988); Don Hesselgesser, 39 IBLA 75, 76 (1979); Oliver Reese, 34 IBLA 103, 105 (1978); Portland General Electric Co., 29 IBLA 165, 167 (1977).

Furthermore, even assuming the general language of the July 29 order could be construed as prohibiting appellant from accessing his claims, it specifically stated that "[t]hese restrictions do not apply to persons with permits." Appellant has failed to show that he sought to obtain a permit from the Forest Service that would have allowed him access to his claims to perform his assessment work and that he was turned down for such a permit. 6/ See Michael Greninger, 119 IBLA 383, 386 (1991).

In any case, appellant has, on appeal, dropped the argument that he is entitled to a deferment because of the high risk of fires, in favor of the contention that he is entitled because he was precluded from gaining access to the subject mining claims by the August 16 closure order. Such a contention, however, suffers from the same infirmity discussed above, *i.e.* the August 16 closure order excepted permitted activities and there is no evidence that appellant sought permission from the Forest Service to access his claims and was denied. 7/ As we said in A. J. Maurer, Jr., 36 IBLA 4, 9

5/ Nor was the July 29 order operative during all of the 1988 assessment year. It took effect Aug. 1, 1988 and, thus, did not affect appellant's ability to enter upon the surface of the subject mining claims during other times of the assessment year.

6/ Although the Regional Forester stated in his letter to BLM that appellant could have submitted a notice of intent (36 CFR 228.4 (1988)) or a plan of operations (36 CFR 228.5 (1988)) to receive approval to conduct his assessment work, nothing in the case file indicates that either a notice or a plan was necessary in order to do so. That is because 36 CFR 228.4(a) (1988) requires a notice from any person proposing to conduct mining operations which might cause "disturbance of surface resources," and a proposed plan of operations where such operations "will likely cause significant disturbance of surface resources." However, 36 CFR 228.4(a)(2)(iii)(1988) provides that a notice need not be filed "for operations which will not involve the use of mechanized earthmoving equipment such as bulldozers or backhoes and will not involve the cutting of trees." The record before us does not disclose the activities appellant intended to pursue to satisfy the assessment work requirement. Nevertheless, even if no notice or plan were required, appellant could have sought some type of permit from the Forest Service to gain access to conduct his operations, and there is no evidence that he did so.

7/ We note that by plotting the location of the claims on the map of the "Closure Area," submitted on appeal by appellant, it is apparent that only portions of seven of the mining claims, the Patricia #1, Patricia #2 and #6, and Valerie #1 through #4 mining claims fall within the closure area.

(1978): "[B]efore a claimant can complain that access has been foreclosed, he must make an attempt to gain access." ^{8/}

Thus, the fact that appellant did not perform the assessment work was not due to some legal impediment to obtaining access for such performance; rather, it was due to his own failure to obtain the necessary approval. Under such circumstances, appellant is not entitled to a deferment. See A. J. Maurer, Jr., supra at 9.

Appellant also contends that he was informed by "Forest Service personnel" on August 17, 1988, prior to the end of the 1988 assessment year, "that the closure orders would be sufficient evidence for a deferment request" (SOR at 2). ^{9/} Even assuming that appellant was so informed by employees of the Forest Service, such information does not bind BLM or otherwise preclude BLM from thereafter denying appellant's petitions for deferment where such deferment is not warranted under the applicable statute and Departmental regulations. See, e.g., Gulf States Petroleum, Inc., 113 IBLA 55, 58 (1990).

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.

Bruce R. Harris
Deputy Chief Administrative Judge

I concur:

James L. Burski
Administrative Judge

^{8/} We do not mean to suggest that appellant was required to attempt entry of the claims in the face of the closure order. However, knowing that the closure order existed and based on the language thereof, appellant must show that he sought permission from the Forest Service to enter his claims and was denied that permission.

^{9/} Appellant specifically refers in his SOR to two closure orders, noting earlier that there is an "additional concurring Forest Service closure order," which, "[I]ike the previously submitted order, * * * prevented Mr. Wilson's access to the [subject] claims" (SOR at 2). Appellant states that he will submit a copy of this other closure order. He has not provided such an order.

