

DON HESSELGESSER

IBLA 79-16 Decided January 24, 1979

Appeal from a decision of the Idaho State Office, Bureau of Land Management, denying a petition for deferment of assessment work on certain mining claims. I-14750.

Affirmed.

1. Mining Claims: Generally--Mining Claims: Assessment Work

A petition for deferment of assessment work may only be granted pursuant to 43 CFR 3852.1, where "legal impediments" exist which affect the right of a mining claimant to enter upon the surface of a claim or group of claims. Pending litigation, which does not, in and of itself, preclude access to the mining claims does not constitute "legal impediments" within the ambit of the Act of June 21, 1949, 30 U.S.C. § 28(b) (1970), and a petition for deferment of assessment work will be denied.

2. Mining Claims: Generally--Mining Claims: Assessment Work

A mining claimant petitioning for temporary deferment of annual assessment work is required by 43 CFR 3852.2(a) to file the petition in duplicate, and to attach a copy of notice to the public to one copy of the petition. The copy of the public notice must show on its face that it has been duly filed or recorded. Failure to meet this requirement will cause the petition to be denied.

APPEARANCES: Don Hesselgesser, pro se.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

Don Hesselgesser has appealed from a decision of the Idaho State Office, Bureau of Land Management (BLM), dated August 31, 1978, denying his petition for temporary deferment of assessment work on the Mack I, II, and III mining claims. The State Office denied his petition for the following reasons:

Statutory requirements for granting a temporary deferment have not been met. The Act of June 21, 1949 (63 Stat. 214; 30 U.S.C. 28 b-c), and the regulations contained in 43 CFR 3852 do not provide for temporary deferment of assessment work for the reasons cited in your petition, court action between claimants.

Right-of-way access is not a factor in the inability to perform the required assessment work. Additionally, the required recorded notice to the public of intention to apply for temporary deferment of assessment [sic] work was not submitted with your petition. The Notice of Intention to Hold Mining Claims you filed is not required when filing a petition with this office.

Hesselgesser again states with his appeal that there is a court action pending involving these claims and "if the court rules in favor of the plaintiff and had we done our assessment work it would not be in our benefit."

[1] The governing regulation pursuant to the Act of June 21, 1949, 30 U.S.C. § 28(b) (1970), 43 CFR 3852.1, sets forth the conditions under which deferment may be granted:

The deferment may be granted where any mining claim or group of claims in the United States is surrounded by lands over which a right-of-way for the performance of assessment work has been denied or is in litigation or is in the process of acquisition under State law or where 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.

We have repeatedly 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. A. J. Maurer, Jr., 36 IBLA 4 (1978); Oliver Reese, 34 IBLA 103 (1978). Moreover, we have specifically ruled that this type of pending litigation involving mining claims does not constitute "a legal impediment" within the meaning of the law and the regulation. Where a claimant is not precluded access to the mining claims by virtue of the litigation, but rather is unwilling to invest time and money for assessment work which may later be lost if a court decision is unfavorable, we have held that the petition for deferment is properly denied. Charlestone Stone Products,

Inc., 32 IBLA 22 (1977); Portland General Electric Company, 29 IBLA 165 (1977).

[2] Appellant also raises other unsupported allegations that "squatters" have also prevented his access to the claims in question by putting him in physical danger if he attempts to enter the claims. This does not constitute a "legal impediment," supra. In any event, there is nothing in the record to confirm this allegation, nor do we need to further examine what efforts appellant has made to gain access under these alleged circumstances, because he has failed to comply with the mandatory requirements of 43 CFR 3852.2, which provides in pertinent part:

(a) In order to obtain temporary deferment, the claimant must file with the authorized officer of the proper office, a petition in duplicate requesting such deferment. No particular form of petition is required, but the applicant must attach to one copy thereof a copy of the notice to the public required by the act which shows that it has been filed or recorded in the office which the notices or certificates of location were filed or recorded. The petition and duplicate should be signed by at least one of the owners of each of the locations involved, shall give the names of the claims, dates of location, and the date of the beginning of the one-year period for which deferment is requested. Each petition shall be accompanied by a \$10 nonrefundable service charge. [Emphasis added.]

Having failed to file the required public notice, appellant's petition for deferment may not properly be considered, and was appropriately denied.

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.

Edward W. Stuebing
Administrative Judge

We concur:

Douglas E. Henriques
Administrative Judge

Frederick Fishman
Administrative Judge

