



RIDGE TOP MINING COMPANY, *ET AL.*

175 IBLA 198

Decided July 22, 2008



United States Department of the Interior
Office of Hearings and Appeals
Interior Board of Land Appeals
801 N. Quincy St., Suite 300
Arlington, VA 22203

RIDGE TOP MINING COMPANY, *ET AL.*

IBLA 2007-224

Decided July 22, 2008

Appeal from a decision issued by the Oregon State Office, Bureau of Land Management, declaring 15 mining claims and 1 mill site forfeited for failure to timely pay maintenance fees or to qualify for a small miner waiver. ORMC 145743, *et al.*

Affirmed; request for hearing denied; petition for stay denied as moot.

1. Mining Claims: Assessment Work--Mining Claims: Rental or Claim Maintenance Fees: Small Miner Exemption

The purpose of the related party provision of 30 U.S.C. § 28f(d)(2) (2000) is to limit the applicability of the small miner waiver. Congress explicitly limited eligibility for such waivers to claimants and all related parties holding 10 mining claims, mill sites, or tunnel sites, or any combination thereof, on public lands. Congress defined “related party,” other than a spouse or dependent children, in terms of control. The regulations clearly provide flexibility to determine what constitutes control in any particular circumstance. Where the totality of the evidence supports the conclusion that individual claimants filing Waiver Certifications and a corporate entity, also filing a Waiver Certification, are related parties holding more than 10 mining claims or mill sites, those claims and sites are properly declared forfeited.

2. Mining Claims: Assessment Work--Mining Claims: Rental or Claim Maintenance Fees: Small Miner Exemption

A claimant who does not qualify for a small miner waiver because the claimant and related parties hold more than 10 mining claims or mill sites is not entitled to cure that defect because the requirement that a claimant and all related parties hold not more than 10 mining claims, mill sites, or tunnel sites, or any combination thereof, on

public lands is a statutory requirement, 30 U.S.C. § 28f(d)(1)(A) (2000), and, in accordance with 43 C.F.R. § 3830.93(a), “[i]f there is a defect in your compliance with a statutory requirement, the defect is incurable.”

APPEARANCES: Shonee D. Langford, Esq., and Myles A. Conway, Esq., Salem, Oregon, for appellants; Fred O’Ferrall, Chief of Lands & Mineral Resources, Bureau of Land Management, U.S. Department of the Interior, Portland, Oregon, for the Bureau of Land Management.

OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

Ridge Top Mining Company LLC (Ridge Top), Jerry K.F. Chilson, Richard L. Bower, Richard D. Bower, Rosemary J. Bower, and Kyle S. Bower (appellants) have appealed from and petitioned for a stay of a June 8, 2007, decision of the Oregon State Office, Bureau of Land Management (BLM), declaring 15 mining claims and 1 mill site forfeited because appellants failed to pay maintenance fees or qualify for a waiver of fees on or before September 1, 2006, for the 2007 assessment year.¹

BLM determined that appellants were not eligible for a waiver of maintenance fees because Jerry K.F. Chilson, Richard D. Bower, Richard L. Bower, and Ridge Top were related parties and together they had filed waivers for the 2007 assessment year for more than 10 claims and sites.

Because the record shows that appellants were not eligible for a waiver of maintenance fees for the 2007 assessment year, and that they did not pay maintenance fees for the mining claims and mill site on or before September 1, 2006, and because the waivers filed by appellants for the 2007 assessment year are not subject to cure, BLM properly declared the claims and mill site forfeited and void. The petition for stay is denied as moot.

Applicable Law

Under 30 U.S.C. § 28f(a) (2000), the holder of an unpatented mining claim, mill site, or tunnel site is required to pay a maintenance fee for each claim or site on or before September 1 of each year for the years 2004 through 2008. 43 C.F.R. § 3834.11(a)(2). The failure to pay the claim maintenance fee “shall conclusively constitute a forfeiture of the unpatented mining claim, mill or tunnel site by the

¹ The mining claims are the Dust Devil #4 (ORMC 145743), Teddy Ridge #1 and #2 (ORMC 149921 - 22), Royal Flush #1 - #3 (ORMC 150152 - 54), Lost Mountain 1:1 (ORMC 153988), and Helm’s Deep #3 - #10 (ORMC 158692 - 99). The mill site is the TRMC Millsite (ORMC 154883).

claimant and the claim shall be deemed null and void by operation of law.” 30 U.S.C. § 28i (2000); 43 C.F.R. §§ 3830.91(a) and 3835.92(a). Congress, however, provided the Secretary with discretion to waive the fee for a claimant who certified in writing (Waiver Certification) that on the date the payment was due, the claimant and all related parties held not more than 10 mining claims, mill sites, or tunnel sites, or combination thereof, on public lands and had performed assessment work required under the Mining Law of 1872, for the preceding assessment year ending at noon on September 1 of the calendar year in which payment of the claim maintenance fee is due. 30 U.S.C. § 28f(d)(1) (2000); *see also Audrey Bradbury*, 160 IBLA 269, 273-74 (2003). BLM implemented this statute with a regulation that requires a claimant to file “BLM’s waiver certification form on or before September 1 of each assessment year for which you are seeking a waiver.” 43 C.F.R. § 3835.10(a).

The statute provides at 30 U.S.C. § 28f(d)(2)(2000) that a related party is “a person who controls, is controlled by, or is under common control with the claimant,” and clarifies that “the term control includes actual control, legal control, and the power to exercise control, through or by common directors, officers, stockholders . . . or any other means.”

The term “[r]elated party” is defined at 43 C.F.R. § 3830.5 as “(a) The spouse and dependent children of the claimant as defined in section 152 of the Code of Internal Revenue of 1986; or (b) A person who controls, is controlled by, or is under common control with the claimant.” “Control” is defined as “actual control, legal control, or the power to exercise control, through or by common directors, officers, stockholders, a voting trust, or a holding company or investment company, or any other means.” 43 C.F.R. § 3830.5. BLM states, under that definition, that it “may determine, based on evidence that we find adequate, that a stockholder who is not an officer or director, or who is not a majority shareholder, of a company or corporation exercises control as defined in these regulations.” *Id.*

In accordance with 43 C.F.R. § 3835.92(d), if a claimant, a co-claimant, or any related party submits Waiver Certifications for more than 10 claims or sites and fails to pay the maintenance fee due for each claim on or before the due date, the claims and/or sites are forfeited and “you may be subject to criminal penalties under 18 U.S.C. 1001.”

Factual Background

The Helm’s Deep Claims

Richard L. Bower located the Helm’s Deep #3 - #10 claims on March 18, 2004, in sec. 12, T. 33 S., R. 24 E., Willamette Meridian, Lake County, Oregon. On March 19, 2004, he recorded copies of the location notices for the claims with BLM. On November 22, 2004, Bower quitclaimed his interest in one of those claims, the

Helm's Deep #10, to Jerry K.F. Chilson. On the same date, Bower quitclaimed his interest in the Helm's Deep #4 - #9 claims to Ridge Top.

On August 28, 2006, BLM received three Waiver Certifications covering the eight Helm's Deep claims: (1) one filed for the Helm's Deep #3 claim by Richard L. Bower, (2) one filed for the Helm's Deep claims #4 - #9 (and three other mining claims and a mill site discussed below) by Ridge Top, signed by Sandra Chilson as "Sec/Treasurer," and (3) one filed for the Helm's Deep #10 claim by Jerry K.F. Chilson.

The TRMC Millsite, and the Lost Mountain 1:1 and Teddy Ridge Claims

On April 16, 2004, the original locator quitclaimed his interest in the TRMC Millsite, and the Lost Mountain 1:1 and Teddy Ridge #1 - #2 mining claims to Richard D. Bower. The Teddy Ridge claims are located in the same section as the Helm's Deep claims. The Lost Mountain claim and the mill site are located nearby in section 23 of the same township.

On November 22, 2004, Bower quitclaimed his interest in those claims and mill site to Ridge Top. On August 28, 2006, BLM received the Waiver Certification discussed above filed on behalf of Ridge Top and signed by Sandra Chilson. That certification listed these three claims and the mill site, as well as the Helm's Deep #4 - #9 claims for a total of 10 mining claims and sites.

The Royal Flush Claims

The original locator of the Royal Flush #1 - #3 claims quitclaimed his interest in the claims to Richard D. Bower on July 31, 1997. The Royal Flush claims are located in sec. 14, T. 33 S., R. 24 E., Willamette Meridian. All subsequent annual filings received by BLM list Richard D. and Kyle S. Bower as co-owners of the claims, including a Waiver Certification filed on August 28, 2006.

The Dust Devil #4 Claim

Richard L. Bower and Rosemary J. Bower acquired the Dust Devil #4 claim from the original locator by quitclaim deed dated December 29, 1995. That claim is located in sec. 23, T. 33 S., R. 24 E., Willamette Meridian. Thereafter, they annually filed documents with BLM, including a Waiver Certification filed on August 28, 2006.

Claim and Mill Site Ownership Status as of the August 28, 2006, Waiver Certification Filings

From the preceding history, we conclude that, on August 28, 2006, the date the five Waiver Certifications were filed with BLM, ownership of the 15 mining claims and the single mill site at issue was as follows:

Ridge Top: nine mining claims and one mill site
Lost Mountain 1:1, Teddy Ridge #1 - #2, and Helm's Deep #4 - #9 mining claims and the TRMC Millsite

Jerry K.F. Chilson: one mining claim
Helm's Deep #10 mining claim

Richard L. Bower: one mining claim
Helm's Deep #3 mining claim

Richard L. and Rosemary J. Bower: one mining claim
Dust Devil #4 mining claim

Richard D. and Kyle S. Bower: three mining claims
Royal Flush #1 - #3 mining claims

On June 7, 2007, BLM issued its decisions declaring the claims and mill site forfeited following receipt from a third party of various documents concerning Ridge Top, which is a Washington State Limited Liability Company, including a copy of its 2005 annual report, dated April 4, 2005, filed with the State of Washington. That report required the listing of title, name, and address of "managers, if applicable. Otherwise, list title, name, and address of members (attach additional sheets in the same format, if necessary)." On the report the names of four individuals appear, each described as "Manager" and each with the same address in Enumclaw, Washington. Those individuals are: Jerry K.F. Chilson, Richard D. Bower, Richard L. Bower, and Sandra Chilson. Sandra Chilson signed the report as "Manager." A copy of the 2006 annual report was also included. It bears the same information, although Sandra Chilson signed that report on April 8, 2006, as "Manager" and also as "Treasurer."

Appellants filed a timely appeal. Therein, they argued only that timely Waiver Certifications had been filed, that the 60-day grace period provided by 30 U.S.C. § 28f(d)(3) (2000) was applicable, and that they should be provided the opportunity to cure the Waiver Certifications or pay the fee within that time period. They did not

argue the related party issue.² Later, in their Additional Statement of Reasons and Request for Hearing, they state that while their pleading assumes, *arguendo*, that they are related parties, they do not concede the issue, asking that the Board grant them a hearing. In their Response to BLM's Answer at page 4, they assert that the "record does not contain the Operating Agreement for this Company or other evidence to support a claim that the appellants exercise a degree of control over the Company to merit consolidation of the claims."

In an order dated November 6, 2007, the Board directed appellants to provide evidence to support a conclusion that Jerry K.L. Chilson, Richard L. Bower, Richard D. Bower, and Ridge Top are not related parties within the meaning of 30 U.S.C. § 28f(d)(2) (2000). In response thereto, appellants provided a copy of the Limited Liability Company Agreement (LLC Agreement) for Ridge Top, dated and effective on April 16, 2004, stating that it shows that none of the individual appellants has control over Ridge Top.

Article 3 of the LLC Agreement identifies the "Members" of Ridge Top and their respective interests: Jerry K.F. Chilson and Sandra Chilson own 50% interest as marital community property, Richard L. Bower and Kyle S. Bower own 25% as tenants in common, and Richard D. Bower owns a 25% interest. Article 1 of the agreement states that the principal purpose and business of Ridge Top is "to own and operate a mining business." Of the five Members, all but Kyle S. Bower are designated as "Managers." *Id.*, Articles 3.1 and 5.3. All five Members holding interests in Ridge Top made some initial capital contribution, the amount of which is redacted in the submitted copy of the LLC Agreement. Ordinary management decisions require the vote of a majority of Managers. *Id.*, Article 5.1. If Managers are deadlocked regarding an ordinary management decision, a vote of Members owning more than 50% of the percentage interests is required. *Id.*, Articles 5.1 and 4.6. Certain actions of the company require the affirmative vote of a supermajority of all Members, *id.*, Article 5.2, including the sale, transfer, lease, encumbrance, disposal, or assignment of "any interest of the Company in the Mine," which also requires the

² We note that in a cover letter dated July 5, 2007, accompanying the notice of appeal, counsel for appellants stated that an enclosed check in the amount of \$2000 was being "offered as evidence of Appellants' willingness to pay any maintenance fees that may have been owed by Appellants as of September 1, 2006." That check, covering the 2007 maintenance fees for all the mining claims and the mill site at issue was signed by Richard L. Bower and drawn on the account of "Richard Bower or R. Joy Bower Sunstones and Such."

prior consent of Richard L. and Rosemary J. Bower, “as long as they remain a Member.”³ *Id.*, Article 5.2.6.

Appellants offered a copy of Exhibit A of the LLC Agreement, which described the “Mine” as “[t]hose certain mining interests generally described and identified as” the Helm’s Deep #3 - #10 mining claims. Appellants explain that Exhibit A had “not been updated to reflect the current ownership of claims by the company,” which is the nine mining claims and one mill site included on the Waiver Certification at issue. Letter dated Nov. 30, 2007.³

Analysis

I. Appellants Are Related Parties

Appellants argue that under the LLC Agreement, no individual Member or Manager exercises independent authority because “all ordinary management decisions” of the company require a majority vote of Managers. Response at 2. Therefore, appellants argue, no individual can exercise control over the company, nor can the company control an individual, so none of the appellants or the company are related parties to one another.

Under 30 U.S.C. § 28f(d)(2)(B) (2000), a related party is a person who controls, is controlled by, or is under common control with the claimant. The term control is defined as including “actual control, legal control, and the power to exercise control, through or by common directors, officers, stockholders . . . or any other means.” 30 U.S.C. § 28f(d)(2) (2000). The Board has held that related parties may include “limited partners” with rights to transfer a claim. *Richard W. Cahoon Family Limited Partnership*, 139 IBLA 323, 325-26 (1997). In *W. Douglas Sellers*, 160 IBLA 377 (2000), we reversed a BLM decision finding that Sellers, who had filed a Waiver Certification for 10 claims, and a corporation were related parties holding more than 10 mining claims. We held

that being one of five directors who would vote on matters pertaining to the company is not enough to infer that he [Sellers] has control over the claims held by the company. Without more evidence than this, we

³ While that provision represents Richard L. and Rosemary J. Bower as being “a Member,” Rosemary J. Bower is not listed in Article 3 as a “Member” of the agreement.

⁴ Appellants state that Ridge Top “no longer owns” the Helm’s Deep #3 and the Helm’s Deep #10 mining claims. The case records forwarded to the Board do not show that Ridge Top ever owned those claims.

cannot reasonably conclude that Sellers possesses ‘actual control, legal control, or the power to exercise control’ of Idaho Mining [and Development Company]’s business affairs.

Id. at 386.

[1] Unlike in *Sellers*, in the instant case we have more evidence of the relationship of the individuals filing Waiver Certifications and the corporate entity, who also filed a Waiver Certification. The LLC Agreement provides that the Managers of Ridge Top “shall have full and complete authority, power and discretion to manage and control the business, affairs and properties of the Company.” LLC Agreement, Article 5.1. In addition, the record shows that one of four Managers of Ridge Top, Richard D. Bower, transferred the nine mining claims and the mill site to the company, the purpose of the company being to engage in the mining business; that Richard D. Bower and two of the other three Managers (Richard L. Bower and Jerry K.F. Chilson) own or co-own mining claims individually; and that the corporation and the three Managers, individually or with their co-owners, sought small miner waivers for the 2007 assessment year by filing Waiver Certifications with BLM in August 2006. Moreover, one of those Managers, Richard L. Bower maintains absolute control over the sale, transfer, lease, encumbrance, disposal, or assignment of any interest in the nine mining claims and one mill site owned by the Company. *See* LLC Agreement, Article 5.2.6.

The purpose of the related party provision of 30 U.S.C. § 28f(d)(2) (2000) is to limit the applicability of the small miner waiver. Congress explicitly limited eligibility for such waivers to claimants and all related parties holding 10 or fewer claims and/or sites. Congress defined “related party,” other than a spouse or dependent children, in terms of control.

The regulations clearly provide flexibility to determine what constitutes control in any particular circumstance in order to identify related parties, even indicating that in certain circumstances a mere stockholder in a corporation, who is neither an officer nor a director, could be considered to control the corporation. *See* 43 C.F.R. § 3830.5. While appellants seek only a focus on individual authority under the LLC Agreement, the close relationship of the individuals and the closely-held nature of the corporation, as well as the fact that the claims and site at issue are all located in the same general area, cannot be ignored. Under the regulations, a person who has the power to exercise control by any means may be considered a related party when BLM finds evidence that it determines to be adequate to support such a finding.

The totality of the evidence supports the conclusion that Richard D. Bower, Richard L. Bower, Jerry K.F. Chilson and Ridge Top are related parties. Since Ridge

Top alone owns 10 claims or sites, aggregation of them with each individual's claim or claims makes each of the related parties ineligible for a small miner waiver.⁵

II. *Waiver Certifications Filed by Related Parties For More Than 10 Mining Claims or Sites May Not Be Cured*

Appellants argue that, if they are found to be related parties, their Waiver Certifications contain defects that BLM must allow them to cure. They cite 30 U.S.C. § 28f(d)(3) (2000), which states that

[i]f a [Waiver Certification] is determined to be defective for any reason, the claimant shall have a period of 60 days after receipt of written notification of the defect or defects by the Bureau of Land Management to: (A) cure such defect or defects, or (B) pay the \$100 claim maintenance fee due for such period.

Appellants contend that the quoted language is a built-in cure provision that supersedes the regulation at 43 C.F.R. § 3835.92(d), cited by BLM's decision, which states that if related parties file Waiver Certifications for more than 10 mining claims and sites and fail to pay the required maintenance fees, the claims and sites are forfeited.

[2] The Board has held that the opportunity to cure a defective filing afforded by 30 U.S.C. § 28f(d)(3) (2000) is only applicable in cases where a party qualified for the waiver and timely filed a Waiver Certification, but made a clerical error like that in *Terrence Timmins*, 158 IBLA 318 (2003), where Timmins listed his claims by the proper names but did not join them with the proper BLM serial numbers. In this case, timely Waiver Certifications were filed, but those claiming the waiver did not qualify for one. The qualification for a small miner waiver is not a curable defect because the requirement that a claimant and all related parties hold not more than 10 mining claims, mill sites, or tunnel sites, or any combination thereof, on public lands is a statutory requirement, 30 U.S.C. § 28f(d)(1)(A) (2000), and, in accordance with 43 C.F.R. § 3830.93(a), "[i]f there is a defect in your compliance with a statutory requirement, the defect is incurable."

Under 43 C.F.R. § 3835.92(d), if a claimant, a co-claimant, or any related party submits Waiver Certifications for more than 10 mining claims or sites, and fails to pay the maintenance fee for each claim or site on or before the due date, the claims and sites are forfeited. The claims or sites are forfeited because of the failure

⁵ While not all the evidence considered on appeal was before BLM when it issued its decision, the record presently supports its action. Therefore, we will affirm BLM's decision.

to satisfy the maintenance fee provision of the statute. 30 U.S.C. § 28i (2000); *Howard J. Hunt*, 147 IBLA 381, 384 (1999).

In this case, appellants were related parties holding more than 10 mining claims or mill sites as of September 1, 2006, and so did not qualify for a small miner waiver at that time. 30 U.S.C. § 28f(d) (2000); 43 C.F.R. § 3835.1. In fact, as addressed in 43 C.F.R. § 3835.92(d), appellants submitted Waiver Certifications for more than 10 claims. Therefore, BLM correctly declared the claims forfeited in its decision.⁶

Appellants request an evidentiary hearing in accordance with 43 C.F.R. § 4.415 to show that BLM's past practice has been to treat Waiver Certifications like those in this case as having curable defects. Appellants further argue that their mining claims are property rights, and as such they are entitled to a hearing to protect their rights to due process. Even if appellants could establish the alleged past practice, it would not benefit them because the regulations state at 43 C.F.R. § 1810.3(b) that “[t]he United States is not bound or estopped by the acts of its officers or agents when they enter into an arrangement or agreement to do or cause to be done what the law does not sanction or permit.” The regulations do not allow a defect in compliance with a statutory requirement pertaining to the Waiver Certifications at issue to be cured. *See* 43 C.F.R. § 3830.93(a). In addition, no hearing is required to protect appellants’ due process rights since Congress has expressly stated that failure to satisfy the maintenance fee provision of the statute results in forfeiture of the claims or sites. *See* 30 U.S.C. § 28i (2000). Appellants’ request for an evidentiary hearing is denied.

To the extent appellants assert additional arguments in support of their appeal, they have been considered and rejected.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, BLM’s decision is affirmed. Appellants’ request for hearing is denied, and the petition for stay is denied as moot.

/s/
Bruce R. Harris
Deputy Chief Administrative Judge

⁶ We note that Ridge Top and the same individuals filed Waiver Certifications on Aug. 29, 2005, for the 2006 assessment year for the same claims. Appellants did not qualify for waivers at that time for the same reasons as set forth in this decision. Likewise, those certifications are not subject to cure.

I concur:

_____/s/_____
H. Barry Holt
Chief Administrative Judge