INTERIOR BOARD OF LAND APPEALS

Ahtna, Inc.

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AHTNA, INC.

IBLA 94-367 Decided April 24, 1997

Appeal from a decision of the Alaska State Office, Bureau of Land Management, denying a request for an exemption from payment of annual rental fees for mining claims. AA-27062 through AA-27120, AA-55512 through AA-55566, AA-55573 through AA-55576 and AA-55577 through AA-55582.

Affirmed.

1. Mining Claims: Rental or Claim Maintenance Fees: Generally

The BLM properly denies a request for exemption from payment of rental fees required under the Department of the Interior and Related Agencies Appropriations Act for Fiscal Year 1993, Pub. L. No. 102-381, 106 Stat. 1378-79 (1992), when a mining claimant fails to establish, as required by 43 C.F.R. § 3833.1-7(g) (1993), that it has been denied access by the United States to claims on National Park Service lands.

APPEARANCES: Roy S. Ewan, President, Ahtna, Inc., for Ahtna.

OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

Ahtna, Inc., has appealed from a February 9, 1994, denial by the Alaska State Office, Bureau of Land Management (BLM), of its request for exemption from the payment of annual rental fees for various mining claims described as the Big El Dorado Group (AA-27062 through AA-27120), Nike Claim Block (AA-55512 through AA-55566 and AA-55573 through AA-55576), and Becky Claim Block (AA-55577 through AA-55582). The claims are located in T. 5 N., R. 14 E., Copper River Meridian, Alaska, within the Wrangell-St. Elias National Park and Preserve.

In 1992, Congress enacted, as part of the Department of the Interior and Related Agencies Appropriations Act for Fiscal Year 1993 (the Act), Pub. L. No. 102-381, 106 Stat. 1378-79 (1992), substantive provisions applicable to mining claims. One of the provisions of the Act established that

> for each unpatented mining claim, mill or tunnel site on federally owned lands, in lieu of the assessment work requirements contained in the Mining Law of 1872 (30 U.S.C. 28-28e), and the

> filing requirements contained in section 314(a) and (c) of the Federal Land Policy and Management Act of 1976 (FLPMA) (43 U.S.C. 1744 (a) and (c)), each claimant shall, except as provided otherwise by this Act, pay a claim rental fee of $100 to the Secretary of the Interior or his designee on or before August 31, 1993, in order for the claimant to hold such unpatented mining claim, mill or tunnel site for the assessment year ending at noon on September 1, 1993 * * *.

106 Stat. 1378. The Act also contained an identical provision establishing rental fees for the assessment year ending at noon on September 1, 1994, requiring payment of an additional $100 rental fee on or before August 31, 1993. 106 Stat. 1378-79.

In promulgating regulations to implement the Act, the Department provided in 43 C.F.R. § 3833.1-7(g) (1993) for an exemption from payment of the rental fees for claims and sites located on National Park System lands, when certain conditions were met.

On March 16, 1993, Ahtna submitted to the Superintendent, Wrangell-St. Elias National Park and Preserve, National Park Service (NPS), a proposed plan of operations for the Big El Dorado claim group. Therein, Ahtna stated:

> The exploration activities proposed under this plan are minimal and consist more of identifying the scope of work done in the past. This would include locating the corner posts, claim boundaries and identifying the discovery points. Hand, chip and soil samples will be collected. No mechanized methods of collection will be used. Activities will also include some mapping of the claims and discovery points. The final results of these proposed activities will be used to assess Ahtna Minerals Corporation's continued interest in the claim block. Many factors are being considered in determining continued interest and possible future development. The on ground survey of the block will be an important factor.

(Statement of Reasons (SOR), Attachment 1 at 5.)

By letter of April 22, 1993, NPS notified Ahtna that it "could take no significant action" on Ahtna's proposed plan of operations until the location of the claims was finalized. (SOR, Attachment 2.) It noted that the claims did not meet legal size limitations and that claim boundaries remained to be fixed either by a BLM approved survey or by the satisfaction of four conditions–conforming claim length, width, and area to Federal and State statutory requirements; NPS and claimant agreement on the position of the claim corners; monumentation by claimant of the agreed upon corners; and the filing of amended location notices with the State and BLM reflecting the agreed upon locations. Specifically noting that

accurate claim size and location are essential and that NPS has no authority to permit off-claim activities, except access, NPS required the filing of additional information regarding proposed activities on the claims.

On June 18, 1993, Ahtna filed with the Superintendent a proposed plan of operations for the Nike-Becky group of claims requesting permission to conduct essentially the same activities as proposed for the Big El Dorado claim group. By letter of July 12, 1993, NPS notified Ahtna that it could not review its plan of operations for those claims either until the location of the claims was finalized in the same fashion as described in the April 22, 1993, letter. It authorized Ahtna's access to the claims by fixed wing aircraft to conduct surveys on foot to locate existing claim corners and discovery points. The letter expressly stated that sampling was not authorized. It further stated:

> The location and size of these claims must be fixed prior to consideration by the NPS of any proposal other than survey work. The NPS will consider a proposed plan of operations for survey work, paneling, aerial photography, and monumenting if you wish to expedite claim corner and boundary adjustment needs. Results from this work will need to be compiled and submitted to the NPS for verification as part of the procedures for claim adjustment.

(SOR, Attachment 4 at 1.)

Herein, Ahtna paid the rental fees for the claims at issue for 1993 and 1994. However, on August 31, 1993, it also filed a request that BLM waive those fees and grant an exemption from their payment. Ahtna cited two grounds for granting its request. First, it asserted that because the fees were to be in lieu of assessment work and assessment work was prohibited on claims on National Park System lands, its claims should be exempt from the fee requirements. Second, it stated that it had submitted plans of operations for the claims that had been denied by NPS, thereby prohibiting it from conducting work on the claims.

In a memorandum dated September 1, 1993, the Regional Director, Alaska Region, NPS, informed the Alaska State Director, BLM, that he did not believe that the reasons cited by Ahtna justified granting an exemption from the payment of the fees. He stated that the plans of operations submitted by Ahtna had not been denied, but had been rejected on the basis that Ahtna had failed to submit all the information necessary to conduct the required environmental analyses. He further explained:

> The NPS policy has been to require a notice of intent to hold in lieu of approving plans of operations when such plans are for the sole purpose of annual assessment to hold claims. We do not consider this to constitute the denial of access for operations defined in the Bureau of Land Management Rental Regulations.

In denying Ahtna's request, BLM found that NPS had not issued a declaration of taking or a notice of intent to take and had not otherwise

denied access to the claims. Accordingly, BLM denied Ahtna's request for an exemption from payment of rental fees.

On appeal, Ahtna asserts that it is exempt from paying fees because NPS, by failing to accept or approve its plans of operations, denied Ahtna access to the claims. Ahtna asserts that it should not have to pay the fees because NPS is too slow to review and process its plans of operations. Ahtna admits that it has not yet filed revised plans with NPS, because the plans submitted were to identify and locate claim boundaries and do assessment work, and it alleges that NPS "policy is not to approve plans of operations * * * when such plans are for the sole purpose of performing assessment work," citing 36 C.F.R. § 9.7(a) and (b)(2). (SOR at 9.) Ahtna asserts that its right of access was denied for "frivolous reasons." Finally, Ahtna contends it should be exempt from paying fees because fees are in lieu of assessment work and Ahtna's access for the purpose of performing assessment work "is prohibited by Federal regulation." (SOR at 10.)

[1] Initially, we note that the Act in question required each claimant to pay a rental fee, in lieu of the assessment work requirements, for each unpatented mining claim, mill site, or tunnel site on federally-owned lands. The Act created only one exception to its requirements, the small miner exemption, available to claimants holding 10 or fewer mining claims, mill sites, or tunnel sites on Federal lands who meet all the conditions set forth in 43 C.F.R. § 3833.1-6(a) (1993). William B. Wray, 129 IBLA 173 (1994). The statutory exception was not available to Ahtna because it held more than 10 claims on Federal lands.

Despite the statutory limitation on exceptions to the rental fee requirement, BLM provided, as follows, in proposed 43 C.F.R. § 3833.1-7(e): "Mining claims covered by a deferment of assessment work granted by the authorized officer pursuant to 30 U.S.C. 28(b)-(e) and subpart 3852 of this title are exempt from the payment of this rental fee for the assessment period(s) during which the deferment is granted." 58 Fed. Reg. 12886 (Mar. 5, 1993). It also proposed in a separate section, 43 C.F.R. § 3852.1(b), styled "Conditions under which deferment may be granted:"

> Under the following circumstances, assessment work is deferred for mining claims and sites located upon National Park System lands:
>
> (1) The claimant has received a notice of taking or a notice of intent to take from the National Park Service pursuant to sections 6 and 7 of the Act of September 28, 1976, as amended (16 U.S.C. 1905 and 1906) or the Act of December 2, 1980, as amended (16 U.S.C. 3192).
>
> (2) The claimant has applied for and been denied a Plan of Operations pursuant to 36 CFR part 9.

(3) The claimant is currently maintaining an action in a United States District Court or United States Court of Claims, or Federal appellate courts, for compensation for the taking of his right, title, or interest in a mining claim or site located upon National Park System lands.

In the final rulemaking implementing the Act, proposed 43 C.F.R. § 3852.1(b) was moved to 43 C.F.R. § 3833.1-7(g) and amended to provide for exemption from payment of the rental fees. See 58 Fed. Reg. 38193, 38195 (July 15, 1993). As amended, 43 C.F.R. § 3833.1-7(g) (1993) provided:

> [U]nder the following circumstances, an exemption may be obtained from the payment of the rental fee for mining claims and sites located upon National Park System lands:
>
> (1) The claimant has received a declaration of taking or a notice of intent to take from the National Park Service pursuant to sections 6 and 7 of the Act of September 28, 1976, as amended (16 U.S.C. 1905, 1906) or the Act of December 2, 1980, as amended (16 U.S.C. 3192); or the claimant has otherwise been denied access by the United States to his/her mining claims or sites on National Park Service lands.
>
> (2) The claimant shall provide proof of the above conditions for exemption, filed as a certified statement, by August 31, 1993, with the proper BLM office.

58 Fed. Reg. 38201 (July 15, 1993).

In the preamble, BLM provided the following explanation for the amended language:

> Denial of access means that BLM, in consultation with NPS, has determined as reasonable the claimant's assertion that he has been denied the ability to operate on his claims. This would include situations where the NPS has permanently denied authorization to the claimant to exercise rights to the mining claim. Concerning the forms of exemption proofs that would be acceptable, these would include copies of declarations of takings, or NPS letters that state the denial of access, or any other judicial or administrative order. A declaration by the claimant alone will not be acceptable. When a claim holder has been denied access to his/her mining claims by the NPS, the claim holder is not required to obtain a deferment of assessment work from BLM pursuant to 43 CFR part 3852 in order to be exempt from the rental fee requirement.

58 Fed. Reg. 38195 (July 15, 1993).

Thus, in its final regulations, the Department determined that a claimant would be entitled to an exemption from the rental fee if it could show to BLM's satisfaction that the claimant had been denied access by the United States to its claims.

Ahtna has failed to show that it was denied access by the United States to the claims in question. There is evidence that NPS would not approve its plans of operations without the filing of additional information. Ahtna's position is that because the purpose of those plans was to obtain approval to conduct assessment work, the filing of additional information would not yield a different result. That position is based on its reading of NPS regulations 36 C.F.R. § 9.7(a) and (b)(2), which provide:

> (a) An access permit and approved plan of operations must be obtained by a claimant prior to the performance of any assessment work required by Revised Statute 2324 (30 U.S.C. 28) on a claim in a unit.
>
> (b) Permits will be issued in accordance with the following:
>
> * * * * * * *
>
> (2) * * * No access permits will be granted solely for the purpose of performing assessment work in any units except where claimant establishes the legal necessity for such permit in order to take the claim to patent, and has filed and had approved a plan of operations as provided by these regulations.

Ahtna contends that NPS requires a claimant to have an access permit and an approved plan of operations to conduct assessment work, but that, by regulation, NPS does not grant access permits solely for the purpose of conducting assessment work, unless a claimant is taking a claim to patent. The question for our consideration, however, is whether, in this case, Ahtna was denied access to the claims in question so as to entitle it to an exemption from payment of rental fees.

While Ahtna may have been precluded from then conducting the activities that it wanted to pursue on its claims, the case record fails to show that it was denied access to the claims in question. In rejecting Ahtna's plans of operations as incomplete, NPS required finalization of the location of the claim boundaries and specifically authorized Ahtna to access the Nike-Becky group of claims by fixed wing aircraft to conduct surveys on foot to locate existing claim corners and discovery points. There is no reason to believe that Ahtna could not have obtained the same authorization for the remaining claims for which NPS also required finalization of location. Thus, we are unable to conclude, as required by 43 C.F.R. § 3833.1-7(g) (1993), that Ahtna was denied access to its claims.

Accordingly, 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 denial of an exemption from payment of annual rental fees is affirmed.

Bruce R. Harris
Deputy Chief Administrative Judge

I concur:

T. Britt Price
Administrative Judge