

UNITED STATES  
v.  
JAMES L. PENCE, d.b.a. SHOOTER MINING CO. AND MILTON EMBRY

IBLA 2002-184

Decided July 31, 2002

Appeal from a decision by Administrative Law Judge James H. Heffernan finding the Tron #3 and Tron #4 dependent millsites null and void because of use and occupancy for other than mining or milling purposes. Nevada Contest No. N-66319; NMC 590342 and NMC 590343.

Appeal dismissed as to Milton Embry, decision affirmed, stay denied as moot.

1. Contests and Protests: Generally--Millsites: Generally-- Millsites: Dependent--Millsites: Determination of Validity

When the United States contests a mining claim, it bears the burden of going forward with sufficient evidence to establish a prima facie case on the charges in the contest complaint. That burden is discharged in a contest challenging the validity of two millsites when the Government examiners possess sufficient training and experience to qualify as expert witnesses, and both testify that they personally inspected the millsites and found nothing which would indicate that they are being occupied for uses that are reasonably incident to, or necessary for, prospecting, mining, or processing operations. .

2. Contests and Protests: Government Contests--Mining Claims: Surface Uses--Millsites: Generally--Millsites: Dependent-- Millsites: Determination of Validity--Surface Resources Act: Occupancy

The essence of the statutory grant allowing the appropriation of the public lands for millsites is actual use and occupancy for mining and milling purposes. The Surface Resources Act of July 23, 1955, 30 U.S.C. § 612(a) (1994), further clarifies that use and occupancy shall be for the purposes of prospecting, mining, or processing and uses reasonably incident thereto. The mining claimant must stand ready to prove the validity of the millsite at any

time before patent issues, by demonstrating that he uses and occupies the land for such purposes.

3. Contests and Protests: Government Contests—Mining Claims: Surface Uses—Millsites: Generally— Millsites: Dependent—Millsites: Determination of Validity—Surface Resources Act: Occupancy

Where a contestee chose not to retain counsel, despite ample opportunity and urging to do so, and chose not to put on a case on his own behalf, the Government's prima facie case is un rebutted. In such circumstances, the Board properly affirms the Administrative Law Judge's decision declaring the millsites null and void.

APPEARANCES: R. Daren Barney, Esq., and Michael J. Ostermiller, Esq., St. George, Utah, for appellant; David Grayson, Esq., Office of the Field Solicitor, U.S. Department of the Interior, for the Bureau of Land Management.

#### OPINION BY ADMINISTRATIVE JUDGE PRICE

James L. Pence, d.b.a. Shooter Mining Co., and Milton Embry, by and through counsel, have appealed and requested a stay of the December 10, 2001, decision of Administrative Law Judge James H. Heffernan declaring the Tron #3 and Tron #4 dependent mill site claims 1/ null and void and canceling the mineral entries. The land embraced by the millsites was segregated for land exchange N-61968 by the notation of BLM records on October 1, 1997. (Exh. G-1 at 3.) 2/ Judge Heffernan issued his decision following a hearing on a contest complaint initiated by the Bureau of Land Management (BLM) which alleged that the millsites "are not being occupied for uses that are reasonably incident, or necessary for, prospecting, mining, or processing operation [sic] under the mining laws as provided for by 43 CFR 3712.1 and Section 4(a) of the Act of July 23, 1955." 30 U.S.C. § 612(a) (1994). 3/

1/ The Tron #3 and Tron #4 millsites were located on Feb. 25, 1990, and are dependent on the nearby Paan mining claims also held by appellants (Transcript (Tr.) at 25, 45). The Paan claims are believed to be "tied to a gold deposit," although the matter is not certain. (Tr. at 49.) The mill sites are located in sec. 17, T. 15 S., R. 67 E., Clark County, Nevada, Mount Diablo Meridian. (Mineral Report dated Jan. 31, 2000, BLM Exh. G-1, at 6.) 2/ Under 43 CFR 2201.1-2, the effect of this notation was to withdraw the land from the operation of the mining laws and prevent the initiation of new rights thereto.

3/ Public lands may be occupied pursuant to valid millsite claims in accordance with the general mining laws, for the purpose of prospecting, mining, or processing, and uses reasonably incident thereto, as required by section 4(a) of the Surface Resources Act of July 23, 1955, 30 U.S.C. § 612(a) (1994). Mining activities are also subject to the regulations (43 CFR Subpart 3715), promulgated effective Aug. 15, 1996 (61 Fed. Reg. 37115 (July 16, 1996)),

On April 15, 2002, BLM filed a Motion to Dismiss for Failure to Appeal in a Timely Fashion (Motion), a challenge based upon the January 22, 2002, certificate of service for Embry's and Pence's Notice of Appeal. Appellants responded in opposition to the Motion on April 29, 2002. The certified mail receipts in the record show that Embry received Judge Heffernan's decision on December 12, 2001, whereas Pence received it on December 26, 2001. Embry's Notice of Appeal was due 30 days after receipt of the decision, or January 11, 2002, and Pence's was due on January 25, 2002. The joint Notice of Appeal was received by the Hearings Division on January 25, 2002. Pence's Notice of Appeal was thus timely. However, as Embry's filing was beyond the 10-day grace period afforded by 43 CFR 4.401 and recognized by 43 CFR 4.411(c), BLM's Motion is well-founded, and Embry's appeal is properly dismissed.

We turn now to the facts underlying the appeal. As stated, the contest complaint alleged that the millsites were not being occupied for uses that are reasonably incident, or necessary for, prospecting, mining, or processing operations. Pence answered the complaint on May 12, 2000, specifically denying the charge that his and Embry's use and occupancy of the Tron #3 and Tron #4 violated the law. He averred that the millsites and the building "have at all times, continuous to this date, been occupied for uses that are reasonably incident to, or necessary for, prospecting, mining, or proc[essing] operation[s]." (Answer at 1.) Pence contended that he and Embry had received no notice of "any allegations of the charges set forth in the complaint," and that none was given by the mineral examiners when the millsites were inspected. (Answer at 1.) Lastly, he stated that "[n]o inspection report was sent or received by Contestee," even after he personally requested a copy. (Answer at 1.)

At Pence's request, the original hearing date of April 3, 2001, was twice continued for the purpose of allowing him to secure witnesses and evidence, and to retain counsel. More particularly, on March 30, 2001, Judge Heffernan issued an order postponing the hearing date and directing Pence and the counsel he was expected to engage to file a written status report on or before May 31, 2001, regarding their readiness for trial. On May 29, 2001, Pence filed a pro se status report in which he averred that he had been "unable to obtain sufficient funds to pay the fees and other attorney charges and the attendance fees and other costs of witnesses." He further stated that he had "placed some of [his] property up for sale," and he expected to close that sale within 60 days, which would generate "sufficient funds to be properly represented at the hearing." Thereafter, on June 4, 2001, the Judge issued an order granting Pence 90 days to prepare for trial, which he scheduled for September 5, 2001. The hearing went on as scheduled, and Pence appeared without counsel.

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fn. 3 (continued)

which are intended to limit the residential occupancy of mining and millsite claims to that permitted by section 4(a) of the Surface Resources Act. See 43 CFR 3715.0-1 and 3715.0-5.

BLM's case consisted of the Mineral Report, admitted in evidence without objection as BLM's Exh. G-1, and the testimony of geologists Edward Seum and Mark Chatterton, who co-authored it.<sup>4/</sup> Both geologists testified that, based upon a number of personal inspections of the millsites over the years and their expert knowledge, the millsites were not being used for mining purposes, and there was no evidence of mining activity (Tr. at 24-26, 35-36), only a two-story mill building with electricity in which some supplies were stored (Tr. at 27, 36, 45-47). It appears that the building had water service as well, although the septic system was not presently being used. (Mineral Report at 12.) A camper trailer was also on site. (Mineral Report at 12.) Chatterton stated that there was no milling or mining equipment of any type in the building when he last inspected it (Tr. at 46-48), no equipment related to mining activities outside it (Tr. at 48-49), and that what odds and ends were there were unused (Tr. at 49). The geologists' testimony is reflected in the Mineral Report and photographs accompanying it.

Regarding the failure to provide appellant with a copy of the Mineral Report, Chatterton testified that Pence had requested a copy of the contest complaint file rather than the Mineral Report, and that the complaint file was maintained in the Nevada BLM State Office. He stated that he told Pence to contact the State Office, but based upon statements made in the course of the hearing, he assumed that Pence had not done so. Chatterton concluded that there had been some misunderstanding regarding what was included in the complaint file. Chatterton further testified that Pence had never requested a copy of the Mineral Report from the Field Office, and that it is not BLM's practice to provide an "unsolicited" copy of the Mineral Report. (Tr. at 69-70.) Pence did not object to this testimony.

BLM thus made a prima facie case that the millsites were not presently being occupied for uses that are reasonably incident to, or necessary for, prospecting, mining, or processing operations. The burden then shifted to Pence to show, by a preponderance of the evidence, that the Tron #3 and Tron #4 millsites were being used or occupied for mining or milling purposes or were being so used when the trial commenced.

While Pence repeatedly declined to be sworn and submit testimony, various colloquies between Pence, opposing counsel, and Judge Heffernan disclosed the following.

Pence stated that he understood that a millsite must be used and occupied in support of mining activity (Tr. at 59), but also admitted that his millsites were not a "production site" where ore was brought in to be processed. He instead characterized them as "a [sic] millsite to test equipment" and "just another step in an overall mining operation." (Tr. at 54, 56.) He described the millsites as a "pilot plant." (Tr. at 73.)

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<sup>4/</sup> Seum's and Chatterton's resumes were admitted in evidence without objection as BLM's Exh. G-2 and Exh. G-3. Chatterton is a Certified Review Mineral Examiner.

Had a further continuance of the trial been granted, Pence stated he would offer “flow sheets, expansion, \* \* \* building sites, buildings, flow sheets, cost figures.” (Tr. at 56.) The flow sheets would show “what was going to be done, how many tons of ore, minimal tons of ore would be used there.” (Tr. at 73; see also Tr. at 65, 74-75.)

Pence stated that he would bring in witnesses if granted a further continuance (Tr. at 51, 74, 80), but when questioned by the judge, was unable to provide the names of such witnesses because, he explained, he would need to contact them first to ascertain whether they would appear, and the main witnesses were in California (Tr. at 77). He declined to testify himself (Tr. at 58, 64, 80-81), asserting that it would be “inappropriate for [him] to testify without having read the charges” (Tr. at 64).

Pence admitted that there was nothing on the ground demonstrating mining activity and nothing which controverted what was depicted in BLM’s photographs. (Tr. 75-77.) He also admitted that there was no mining equipment on the millsites. (Tr. at 80.) According to Pence, this was because BLM would not permit him to hire a watchman to secure the site, and all the equipment and supplies ever brought to the site had been stolen. He did not identify this equipment or supplies, however. (Tr. at 74-76, 80.)

Pence did not retain counsel in the approximately 7 months between receipt of the first notice of hearing in February and the hearing date (Tr. at 51-53) because, despite representations made to support his requests for continuances, he did not believe he needed to do so until he received a copy of the Mineral Report, submitted as BLM Exh. G-1. (Tr. at 12, 61, 79.) However, counsel for BLM had also advised Pence to retain counsel. (Tr. at 62-63.) It was counsel for BLM who actually provided a copy of the Mineral Report via facsimile transmission the Friday before the hearing was to commence after the Labor Day holiday. (Tr. at 71-73.)

Pence stood by his answer to the complaint, but did not object to the admission in evidence of the Mineral Report (Tr. at 23-24) and generally declined to question BLM’s witnesses (28, 29, 31, 50), although he apparently understood their testimony and his right to examine them. (Tr. at 42-43, 50.)

On cross-examination of Chatterton, Pence asked the witness to explain the concept of segregating land for a land exchange (Tr. at 39-40.) It was the only question he had for Chatterton, and he asked none of Seum.

Although Pence did not examine BLM’s witnesses (with the one exception described above), did not submit any evidence, and declined to testify in his own behalf, it is apparent from the colloquies with the judge that Pence’s sole defense at the hearing consisted of the assertion that he had no notice of the contest charge, a contention he continues to urge on appeal through

counsel. Because he did not receive a copy of the Mineral Report until a day or two before the hearing, <sup>5/</sup> Pence argues:

There is no way that [he] could adequately have prepared a defense without having adequate time to review the Mineral Report and prepare his rebuttals and defenses based on the report's contents. At the hearing Mr. Pence requested additional time in order to accomplish just that, and was denied on the grounds that he had already had several months notice of the subject hearing. It is true that he did have notice of the hearing, but he did not have the government's most substantive piece [sic] of evidence, until just prior to the hearing.

Further, Mr. Pence argued at the hearing that upon receiving the mineral report the morning before trial and reviewing its contents, he learned for the first time that his property had been withdrawn and segregated for land exchange. [Citation omitted.]

(SOR at 2.) Appellant therefore argues that due process required Judge Heffeman to either postpone the hearing to allow discovery on the segregation issue<sup>6</sup> or provide an adequate grounds [sic] to rule in the Contestees'/Appellant's [sic] favor." (SOR at 3.) As relief, Pence asks the Board to reverse the decision and remand the case to the Hearings Division to give him the opportunity to present a defense.

[1] When the United States contests a mining claim, it bears only the burden of going forward with sufficient evidence to establish a prima facie case on the charges in the contest complaint. See Humboldt Placer Mining Co. v. Secretary of the Interior, 549 F.2d 622, 624 (9th Cir.), cert. denied, 434 U.S. 836 (1977); United States v. Ware, 113 IBLA 1, 5 (1990). That burden is discharged when, as in the case before us, the Government examiners possess sufficient training and experience to qualify as expert witnesses, and both

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<sup>5/</sup> Pence also asserted that he had requested a copy of an inspection report. However, it is not clearly established in the record that any separate inspection report(s) ever was prepared by Seum or Chatterton or, if such exists, that Pence actually requested a copy. As stated, Pence chose not to examine the witnesses and did not testify himself, Chatterton was not specifically asked about an inspection report by counsel for BLM or the Administrative Law Judge, Chatterton's explanation of why Pence had not been provided a copy of the Mineral Report earlier included no mention of an inspection report (see Tr. at 66, 69-73), and the issue was not otherwise raised or probed in the verbal exchanges between Pence and Judge Heffeman. Even if the record had established that an inspection report exists and that Pence requested a copy of it, Seum's and Chatterton's observations and conclusions relative to the millsites are set forth in the Mineral Report and accompanying photographs, and it is the Mineral Report upon which BLM relied in presenting its prima facie case. For that reason, even assuming an inspection report exists and that it was actually requested by Pence, we perceive no error in failing to provide a copy of it.

testify that they personally inspected the millsites and found nothing which would indicate that they are being occupied for uses that are reasonably incident to, or necessary for, prospecting, mining, or processing. See United States v. Franklin, 99 IBLA 120, 125 (1987); United States v. Ledford, 49 IBLA 353, (1980).

The determination of whether or not the Government has presented a prima facie case of invalidity in the contest of a mining claim is made solely on the basis of the evidence introduced in the Government's case-in-chief, which includes testimony elicited in cross-examination. If, upon the completion of the Government's presentation, the evidence is such that, were it to remain unrebutted, a finding of invalidity would properly issue, a prima facie case has been presented and the burden devolves on the claimant to overcome this showing by a preponderance of the evidence. United States v. Willsie, 152 IBLA 241, 262 (2000); United States v. Springer, 491 F.2d 239, 242 (9th Cir.), cert. denied, 419 U.S. 834 (1974); United States v. Mineco, 127 IBLA 181, 187 (1993); United States v. Franklin, *supra*.

As we have said, Pence argues that he had no notice of the charge until he received the Mineral Report, when “he learned for the first time that his property had been segregated and removed from entry under the mining law, and that he had been given no notice whatsoever of that action.” (SOR at 2.) <sup>6/</sup> A reading of the charge made in the contest complaint cannot fairly be said to include any charge other than that, as a present matter, the millsites involved were not being used for mining or milling purposes in the manner required. While it is true that it was not until the hearing that advertence was made to the fact that a proposed land exchange had been noted on the records of the Department on October 1, 1997, it was Pence and not the Government who characterized the fact of the land segregation as a contest charge. (Tr. at 11, 16-18.) When the contest charge was read at the commencement of the hearing, however, it was stated as a present fact. (Tr. at 26.) This is consistent with the Mineral Report, which mentioned in both the Summary and Conclusions sections of the report, as part of describing the factual situation before BLM, that the land embraced by the millsites had been segregated, but recommended a contest charge challenging Pence’s current

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<sup>6/</sup> It is well-settled that a matter not charged in a contest complaint cannot be used as a basis for finding a claim invalid unless it is raised at the hearing and the contestee did not object to its consideration. See, e.g., United States v. Miller, 138 IBLA 246, 277-78 n.18 (1997); United States v. McElwaine, 26 IBLA 20 (1976). It would have been entirely proper for BLM to include in the contest complaint the additional charge that the millsites in question had not been used or occupied as of Oct. 1, 1997, for mining and milling purposes. The effect of such a charge would have been that, even if contestees were able to show, as a present fact, that they were using or occupying the millsites for mining or milling purposes, the millsites might nevertheless be declared invalid because contestees were not making such use of them as of the date the land was segregated. However, for the reasons which follow, we think it clear that no such charge was made in the complaint.

occupancy of the millsites. Compare Mineral Report at 3 and 5. Thus, the only issue joined at the hearing was whether, as a present fact, the millsites were being so used and we will limit our consideration accordingly.

[2] The very essence of the statutory grant allowing the appropriation of the public lands for millsites is actual use and occupancy for mining and milling purposes. 30 U.S.C. § 42(a) (1994). Thus, the statute provides:

Where nonmineral land not contiguous to the vein or lode is used or occupied by the proprietor of such vein or lode for mining or milling purposes, such nonadjacent surface ground may be embraced and included in an application for patent for such vein or lode, and the same may be patented therewith \* \* \*; but no location \* \* \* of such nonadjacent land shall exceed five acres. [Emphasis supplied.]

Section 4(a) of the Surface Resources Act of July 23, 1955, 30 U.S.C. § 612(a) (1994), clarifies that Pence's use and occupancy shall be for the purposes of prospecting, mining, or processing and uses reasonably incident thereto. As we said in United States v. Collord, 128 IBLA 266, 314 (1994) (Burski, A.J., concurring), "the location of a millsite unaccompanied by actual use or occupancy of the land for mining or milling purposes is akin to the location of a mining claim unsupported by a discovery; the locator gains no rights as against the United States." Thus, the mining claimant must stand ready to prove the validity of the millsite at any time before patent issues, by demonstrating that he uses and occupies the land for mining or milling purposes, these being prospecting, mining, or processing, and uses reasonably incident thereto, as set forth in the mining laws and the Surface Resources Act. See United States v. Swanson, 93 IBLA 1, 93 I.D. 288 (1986).

In that regard, it must be noted that the "mere intention to use a site in the future for milling purposes does not constitute compliance with the law." United States v. Collord, *supra* at 314-15, citing United States v. Skidmore, 10 IBLA 322, 327 (1973), and United States v. S.M.P. Mining Co., 67 I.D. 141, 143-44 (1960); see also Lindley on Mines, 3d ed. at 1176 ("Mere intention or purpose on a certain contingency of performing acts of use or occupation thereon will not satisfy the law.") Moreover, neither occasional use and occupancy, nor use and occupancy of a millsite as a staging area will suffice. United States v. Collord, *supra* at 289, and cases cited therein. Accordingly, absent actual mining and milling activities, Pence's use and occupancy of the millsites for other purposes is not authorized and is properly subject to challenge in a government contest, which contest may be initiated at any time before patent issues.

Pence's attempt to move this Board to reopen the contest hearing and save him from the consequences of his decisions in the hearing below in any event is not well-taken. We have considered other requests in similar circumstances. In United States v. Gassaway, 43 IBLA 382, 384 (1979), the Board stated:

[W]here a mining claimant requests a further hearing or the continuance of a hearing of which he has had adequate notice he must posit such "exculpatory factors" as will justify the grant of an additional opportunity to present his case. \* \* \* United States v. Foresyth, 15 IBLA 43 (1974).

There are no exculpatory factors in this appeal. Pence's claim that he had no notice of the contest charge is simply not supported by the record. He received and intelligently and coherently answered the contest complaint by denying the charge. Moreover, the charge that the millsites are not being occupied for mining or milling or uses that are reasonably incident to, or necessary for, prospecting, mining, or processing operations under the mining laws in this case is not complex or one which necessarily demands sophisticated expert evidence to rebut.

The Government's case, as set forth in the Mineral Report and supporting photographs, proceeded from the simple contention that there was no evidence of mining or milling activity of any kind for years. Pence had only to show that this was not true by demonstrating what mining or milling activity was occurring by presenting the evidence he claimed to possess, with or without the assistance of the counsel he was urged to retain. Instead, he virtually admitted the Government's contest charge. We hold that in the circumstances here presented, neither the receipt of the Mineral Report a day or two before the hearing nor appellant's failure or refusal to retain counsel constitutes exculpatory factors which would justify issuing an order to reopen the contest proceedings.

[3] Pence chose not to retain counsel, despite ample opportunity and urging to do so, and, having made that decision, chose not to put on a case on the contestees' behalf. The Government's prima facie case thus stands un rebutted. When the Government presents evidence that a millsite is not being used or occupied for mining or milling purposes, and the claimant fails to refute that evidence, the millsites must be declared null and void. United States v. Highley, 30 IBLA 21, 24 (1977). In such circumstances, the Board will affirm the Administrative Law Judge's decision that the millsite does not qualify as a dependent millsite pursuant to 30 U.S.C. § 42 (1994). William J. Schweiss, 139 IBLA 10, 15 (1997); United States v. Mineco, 127 IBLA 181, 189 (1993). Moreover, appellant has made no offer of proof which would indicate an outcome different from that reached in Judge Heffernan's decision, and vague, unsupported assertions furnish no basis for reopening a contest hearing. United States v. Murdock, 65 IBLA 239, 243 (1982), citing United States v. Speckert, 55 IBLA 340, 342 (1981).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, Embry's appeal is dismissed, the decision appealed from is affirmed, and the stay is denied as moot.

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T. Britt Price  
Administrative Judge

I concur:

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James L. Burski  
Administrative Judge