

Editor's note: Appealed -- aff'd, sub nom. Aztec Exploration and Development Co. v. Morton, Civ. No. 77-827 PHX (D. Az. March 13, 1978), dismissed (settled) No. 78-2505 (9th Cir. Sept. 1, 1978)

CONTINENTAL OIL COMPANY
v.
AZTEC EXPLORATION AND DEVELOPMENT COMPANY

IBLA 77-330

Decided August 24, 1977

Appeal from dismissal of contestee's protest against initiation of private contest proceedings.
Contest No. A-9890.

Affirmed.

1. Administrative Procedure: Generally--Mining Claims: Contests--
Rules of Practice: Private Contests

Where, pursuant to 43 U.S.C. § 315g (1970), a State has acquired land subject to a reservation of minerals to the United States, and the State thereafter leases the surface of the land to a corporation for purposes which are plainly incompatible with mining, the surface lessee has standing to initiate a private contest to determine the validity of unpatented mining claims located on the land. It is not essential to the cause of action that there be an actual physical interference by one party with the other party's use of the land if their respective interests are clearly and potentially conflicting.

APPEARANCES: Albert H. Mackenzie, Esq., Phoenix, Arizona, for the appellant; John C. Lacy, Esq., Phoenix, Arizona, for Continental Oil Company.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

Aztec Exploration and Development Company (Aztec) asserts ownership of certain unpatented mining claims in sections 21, 22, and 23, T. 4 S., R. 9 E., G&SRM, Pinal County, Arizona. The land on which these claims are situated was acquired by the State of Arizona (the State) by an exchange with the United States pursuant

to section 8 of the Taylor Grazing Act, 43 U.S.C. § 315g (1970), by which the United States reserved all minerals in the lands granted. Continental Oil Company (Conoco) is the lessee of the land from the State and has applied to the State to acquire its interest in the subject land in exchange for certain lands in Santa Cruz County, Arizona.

On February 11, 1977, Conoco filed a complaint in the Arizona State Office of the Bureau of Land Management (BLM), to initiate a private contest proceeding against Aztec pursuant to the Department's rules of practice at 43 CFR 4.450-3. The contest complaint alleged that Aztec's unpatented mining claims, specifically Aztec Nos. 1 through 40, Aztec No. 41 East, Aztec No. 42 East, Montezuma Nos. 1 through 6, and the Coronado Nos. 1 through 35 claims, are invalid. Conoco charges in its complaint that:

- a. A valid discovery as required by the mining laws of the United States does not exist within the limits of the mining claims * * *.
- b. The lands embraced within the limits of the claims * * * are nonmineral in character within the meaning of the mining laws.
- c. The Contestee has not located its claims * * * in compliance with the laws of the State of Arizona evidencing a lack of good faith.
- d. The Contestee has not performed adequate assessment work on the claims * * * and has not shown good faith in any efforts to establish the claims, the claims being held purely for speculative purposes.

Conoco served Aztec with a copy of the complaint. In response, on March 11, 1977, Aztec filed with BLM a two-part document styled "Protest and Answer." The "protest" portion of this document alleges various deficiencies in the contest complaint and a lack of standing on the part of Conoco to maintain a private contest proceeding of this nature against Aztec. In essence, the protest alleges that inasmuch as Conoco is the lessee of the State, which holds only the title to the surface, and could acquire only the title to the surface if the proposed exchange between the State and Conoco were consummated, therefore Conoco has no interest inimical to the claimant of the mineral estate (Aztec), has failed to state a cause of action, and is without standing to initiate the action. The "Protest" incorporates a motion for summary dismissal of the complaint. The "Answer" portion of this submission responds directly to the specific allegations of the complaint.

By its decision dated April 1, 1977, the BLM dismissed Aztec's protest, holding that Conoco, as the surface lessee, had sufficient interest adverse to Aztec to confer standing, citing Turf Paradise Inc. v. Adams, Contest No. 9945, Ariz. 080536 (September 9, 1955), approved by the Assistant Secretary.

Aztec has appealed from this decision and requested that this Board hear oral argument on the issues presented by its appeal.

The record indicates that it is Conoco's intention to excavate an open-pit mine on land adjacent to or near the subject lands, and to use the surface of the subject lands for two heap leach ore dumps. An earthen dam is to be constructed across the drainage area below each dump so as to provide a collection pond having a capacity of about 300,000 gallons of leach liquor. The dumps will be built in 20-foot lifts to a total height of 100-120 feet. Such use of the surface by Conoco as either lessee or owner obviously would be incompatible with the development of a mine or mines on the same land.

It is well established that "Any person who claims title to or an interest in land adverse to any other person claiming title to or an interest in such land * * * may initiate proceedings to have the claim of title or interest adverse to his claim invalidated * * *," 43 CFR 4.450-1 [Emphasis added], whether the contestant be the owner of the surface or the lessee thereof, or even the holder of a government special use permit. Turf Paradise, Inc. v. Adams, *supra*; Duguid v. Best, 291 F.2d 235 (9th Cir. 1961), *cert. denied*, 372 U.S. 906 (1963); Sedgwick v. Callahan, 9 IBLA 216 (1973); Thomas v. DeVilbiss, 10 IBLA 56 (1973), *aff'd*, Thomas v. Morton, 408 F. Supp. 1361 (D. Ariz. 1976), *aff'd* Thomas v. Andrus, 552 F.2d 871 (9th Cir. 1977); City of Phoenix v. Reeves, 14 IBLA 315, 81 I.D. 65 (1974); State of California v. Doria Mining and Engineering Corp., 17 IBLA 380 (1974), *aff'd*, Doria Mining and Engineering Corp. v. Morton, 420 F. Supp. 837 (D. Calif. C.D. 1976) (appeal pending); *see* Everett E. Wilder, 14 IBLA 406 (1974); *cf.* John W. Pope, 17 IBLA 73 (1974).

Aztec argues that "the situation between Contestant and Contestee involves no present clash or confrontation. Continental Oil Co. has no facilities, or buildings or equipment upon the state surface lands above Aztec's claims * * *." It is undeniable that where the owner of the surface estate leases that estate to another for the purpose here contemplated, a potential conflict with the claimants to the mineral estate exists. The owner of valid mining claims for the reserved minerals on patented land has the right to "[e]nter and occupy so much of the surface as may be required for all purposes incident to the prospecting for, mining and removal of the minerals therefrom * * *." 43 U.S.C. § 315g (d) (1970). Thus, each of the parties is asserting a claim to the use of the surface. It is not essential to the cause of action under 43 CFR 4.450-1 that there presently be an actual physical interference by one party to the proceeding as against the other. Indeed, it is more desirable that the issue be resolved before such actual physical interference occurs. In Thomas v. Morton, *supra*, at 1369, the District Court said, "It is obvious from a mere examination and understanding of the respective interests, that they are conflicting. Certainly a

surface owner or even a permittee of surface rights cannot fully use and enjoy those surface rights when constantly threatened with the loss of use of all or even a small portion thereof."

Aztec's other arguments assert: 1) a lack of authority and competence on the part of the BLM officer who signed the decision dismissing its protest; 2) the lack of precedential quality of Turf Paradise Inc. v. Adams, supra, on which that decision relied; and 3) a lack of standing on the part of Conoco based on the alleged invalidity of Conoco's lease from the State, which Aztec is challenging in a lawsuit now pending in Superior Court of Arizona. We find no merit in any of these arguments, and each of them is rejected. ^{1/}

Appellant has requested that the Board hear oral argument on this matter. We do not consider that such a presentation would be useful, and the request is denied.

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.

Edward W. Stuebing
Administrative Judge

We concur:

Douglas E. Henriques
Administrative Judge

Joan B. Thompson
Administrative Judge

^{1/} Of course, should the litigation in the Superior Court result in a final determination that Conoco's lease is invalid, Conoco's standing to maintain the private contest could again be called into question. But unless and until such a ruling is made Conoco's lease is prima facie valid.

