

**Editor's note: Reconsideration denied by Order dated March 20, 1992**

UNITED STATES  
v.  
LOYALL FRAKER

IBLA 89-587

Decided January 3, 1992

Appeal from a decision of Administrative Law Judge Parlen L. McKenna declaring the Molly One millsite claim invalid. NMC-356758.

Affirmed.

1. Millsites: Generally--Mining Claims: Contests--Notice: Generally

A Government contest of a millsite claim is not subject to dismissal for failure to name all interested parties.

2. Millsites: Determination of Validity--Millsites: Independent--Mining Claims: Millsites--Rules of Practice: Appeals: Burden of Proof

When the Government has presented evidence that a quartz mill or reduction works is not present on a millsite, and the claimant fails to refute that evidence, the millsite does not qualify as an independent millsite pursuant to 30 U.S.C § 42 (1988).

3. Millsites: Dependent--Millsites: Determination of Validity--Mining Claims: Millsites--Rules of Practice: Appeals: Burden of Proof

When the Government has presented evidence that a millsite is not being used or occupied for mining and milling purposes, and the claimant fails to refute that evidence, the millsite does not qualify as a dependent millsite pursuant to 30 U.S.C. § 42 (1988).

APPEARANCES: Loyal Fraker, Dayton, Nevada, pro se and on behalf of his son, Loyall Fraker.

## OPINION BY ADMINISTRATIVE JUDGE ARNESS

Loyal Fraker has appealed from a decision by Administrative Law Judge Parlen L. McKenna, dated April 19, 1989, declaring the Molly One millsite invalid on grounds that the millsite was not being used or occupied for mining or milling purposes in connection with a valid mining claim, nor does it contain a quartz mill or reduction works as required by 30 U.S.C. § 42 (1988). The Molly One claim is located in sec. 36, T. 16 N., R. 21 E., Mount Diablo Meridian, Lyon County, Nevada.

On December 22, 1987, the Bureau of Land Management (BLM) initiated contest proceedings by filing a complaint charging that

(1) The residential occupancy of the Molly #1 Millsite, NMC-356758, is not reasonably incident to prospecting, mining, or processing operations (43 CFR 3712.1(a) and 30 U.S.C. 612a);

(2) The Molly #1 Millsite, NMC-356758, is not being used or occupied for mining, milling, processing, beneficiation, or other use reasonably incident thereto (43 CFR 3712.1(a) and 30 U.S.C. 612a, 30 U.S.C. 42); [and]

(3) The Molly #1 Millsite, NMC-356758, does not contain a quartz mill or reduction work (30 U.S.C. 42).

A hearing was held before Judge McKenna on Monday, December 19, 1988. At the hearing, two geologists, Ronald Buder and Daniel Jacquet, testified on behalf of BLM. Buder testified that he examined the Molly One millsite in April, August, and December of 1987 (Tr. 21-22). Buder testified that in April 1987, he observed and photographed the millsite claim and improvements located thereon. The extent of milling equipment he found on the property was "a small metal riffle and several metal containers whose purpose was not clear to me" (Tr. 26). He also observed a pick and shovel. Id.

Jacquet accompanied Buder on all three visits to the millsite (Tr. 35). In his opinion, the riffles constituted the only mining related equipment on the site (Tr. 36). Jacquet testified, concerning the mining claims associated with the millsite, that in April he had observed a prospecting pit on one of the claims which could have required up to a month's work to construct (Tr. 37-38). On his return to the site in August, he noticed that no changes had occurred in the prospect pit since April (Tr. 38). Jacquet observed no quartz mill or reduction works on the site (Tr. 39). He testified that the Molly One millsite claim was, in his opinion, not being used for mining or milling purposes, and had not been so used at any time during Fraker's occupancy. Id. On cross-examination, Jacquet testified that a barn had been constructed on the millsite during Fraker's occupancy, and was being used primarily as a tack room and hay storage for livestock (Tr. 41).

Appellant testified that he is the locator of the Molly One millsite (Tr. 43). He testified that he has had a concentrator on the site since February of 1988, that it was not ready to use until late June or July of

that year, and that it had not been used at all (Tr. 48-51). Appellant stated that he has tested, but not produced, any mineral from his mining claims (Tr. 49). He stated that in 1980 he conveyed his interest in the millsite to his son by inter vivos trust (Tr. 44-45, 54), and that his son was aware of the millsite contest (Tr. 45). Appellant claimed that, as beneficiary of the trust agreement, his son was the real party in interest; therefore, the contest against him must be dismissed.

Judge McKenna concluded that appellant was the real party in interest and that the contest should not be dismissed for failure to provide notice to the proper party. He further concluded that the Molly One millsite claim was invalid because it did not qualify as either an independent or a dependent millsite. Judge McKenna held that although appellant contended that he has a reduction works which would qualify the Molly One as an independent millsite, he did not establish that the equipment was on site or had ever been there, or that he could perform such work.

In his statement of reasons (SOR) on appeal, Fraker alleges that: "the original complaint was its self [sic] fatally flawed and simply so because it was in violation of the Article Four of the same Constitution the Court itself is sworn to uphold." Fraker alleges that the Administrative Law Judge has ignored his assertion that his son is the real party in interest in the contest. He charges that the Judge has confused the identities of the two individuals by misspelling their names, and as a result, has mis-read documents pertinent to his appeal, including the location notice. The spelling of the names of the two men is similar, but not identical.

Fraker alleges that the trust agreement is "a valid quit claim covering [sic] all the doners [sic] property therein to his son \* \* \*," and that Judge McKenna has erroneously inferred that "this is not a legal document \* \* \*." Appellant states that Judge McKenna erroneously interpreted the trust agreement by stating that appellant "reserved the right to live on and even sell the Molly Mill Site One." Finally, appellant complains that Judge McKenna's decision is arbitrarily and unlawfully decided.

[1] Appellant seeks dismissal of BLM's contest against the validity of the millsite which he has occupied alleging that he does not own the millsite and is not an interested party. He claims he has quitclaimed to his son his interest in the Molly One millsite claim by inter vivos trust, and that his son is the proper party to be served with notice of contest proceedings.

Contrary to the argument made on appeal, it is not necessary for the Board to interpret the terms of the trust document in order to resolve this question. The date of issuance of the complaint is the critical date for determining real parties in interest. Prior to that date, it was BLM's obligation to search the appropriate records to obtain ownership information. Patsy A. Brings, 98 IBLA 385, 389 (1987); United States v. Prowell, 52 IBLA 256 (1981). The complaint in this matter was issued to Loyall Fraker, P.O. Box 446, Dayton, Nevada 89403. In his SOR, appellant avers

that his legal name is Loyal V. Fraker; his son's name is Loyall L. Fraker. This averment is consistent with the signatures on the trust agreement.

An affidavit of assessment work performed in 1985, filed as Contestant's Exhibit 11, lists both Loyal (Buck) Fraker and Loyall Fraker as locators of the Molly One claim. The address of both locators is listed on the affidavit as Box 446, Dayton, Nevada 89403. The affidavit was recorded by Loyall L. Fraker. The record establishes that the complaint was issued to Loyall Fraker, who is the party to whom appellant claims that it should have been issued. At the hearing appellant admitted that his son had received actual notice of the complaint; he also waived an offered opportunity for recess to permit the younger Fraker to appear on his own behalf (Tr. 45-46, 56).

It is clear that both appellant and his son were co-locators of the claim, and both should have been named and served. Nonetheless, the record establishes that Loyal V. (Buck) Fraker has appeared in this proceeding both on his own behalf and on behalf of his son, Loyall L. Fraker. When he refused an opportunity to recess the hearing to permit the younger Fraker to appear, and elected to proceed to contest the complaint on the merits, appellant Loyal V. (Buck) Fraker waived any defect in service, admitting that both locators had prior actual notice of the complaint. There is simply no basis for a finding that the contest should be dismissed for a fatally defective procedural error.

Even if the complaint had named only Loyal V. (Buck) Fraker, under these facts, there would be no fatal procedural defect. Appellant occupies the Molly One claim. He admits he located the claim, and filed notices of assessment work performed on the claim. The Board in United States v. Brings, supra at 390, found that affidavits of assessment represent a ready source to determine claim ownership. Evidence in the record therefore establishes that appellant is an interested party to this contest. Current regulations of the Department expressly provide that a Government contest complaint is not subject to dismissal for failure to name all interested parties. See 43 CFR 4.451-2(b).

[2-3] Appellant also argues that Judge McKenna's decision is unconstitutional, arbitrary and capricious. These arguments are not supported by the record, or by reasoned analysis. Concerning the contention by appellant that the Molly One millsite had a reduction works that would qualify the claim as an independent millsite, Judge McKenna found that:

BLM introduced the testimony of Ronald R. Buder and Daniel Jacquet, two BLM geologists, who are very familiar with Mr. Fraker's mining and milling operations. They both testified, and provided photographs as proof, that, as far as mining and milling equipment was concerned, Mr. Fraker's millsite contained only a pick, a shovel, a couple of aluminum riffles, and one or two metal boxes. It was their opinion, based on

their years of experience with mining operations, that this minimal supply of equipment did not constitute a reduction works.

(Decision at 3).

After defining the term "reduction works" to include operations where metals are separated from ore, Judge McKenna concluded that "the minimal mining and milling equipment found on Molly One millsite does not constitute a quartz mill or reduction works sufficient to qualify it as an independent millsite." Id. at 4.

The findings and conclusion so made are fully supported in the record. Appellant offered no contrary proof concerning the existence of the alleged reduction works, and it is clear from the record that the equipment found on the claim was exactly as the Government witnesses described it to be.

With respect to whether BLM had met its burden of proof concerning the existence of a dependent millsite on the location, Judge McKenna evaluated the evidence presented by BLM as follows:

At the hearing, BLM presented evidence showing that Loyall Fraker's associated mining claims are of little value, that Mr. Fraker has done very little mining work and has done no processing of mining material on Molly One Millsite, and that his residence, corral, and barn are not reasonably incident to his mining and milling activities. BLM established a prima facie case as far as all of these issues were concerned, and Loyall Fraker bore the burden of refuting that evidence.

Loyall Fraker admits that he has never processed any mineral material on Molly One Millsite. \* \* \*

\* \* \* \* \*

The fact that Mr. Fraker failed to present any evidence to rebut BLM's proof that his associated mining claims are not workable was fatal to his defense.

(Decision at 4-5).

We find Judge McKenna's decision that appellant has not established the Molly One to be either an independent or a dependent millsite substantiated by the evidence in the record, and accordingly adopt and affirm his findings and conclusions quoted above. See United States v. Swanson, 93 IBLA 1, 93 I.D. 288 (1986). Appellant has failed to establish that these findings were made in error, and has not overcome the prima facie case established by BLM by a preponderance of the evidence, inasmuch as the Government evidence concerning mining equipment, occupancy, and use for mining purposes was uncontested at hearing.

Appellant testified at hearing that he had been prevented from diligent prosecution of mining operations by poor health and malicious interference in his activity by other (Tr. 53, 55). Evaluating this evidence, Judge McKenna found that "Fraker failed to present any evidence to rebut BLM's proof" (Decision at 5). This finding is also supported in the record. Appellant has not shown that this finding was made in error, and has instead focussed his principal argument on the procedural issue previously discussed. Consequently, he has thereby failed to overcome the Government case by a preponderance of evidence, as he was required to do if he were to prevail on appeal. See United States v. Weekley, 86 IBLA 1 (1985).

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.

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Franklin D. Arness  
Administrative Judge

I concur:

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Robert W. Mullen  
Administrative Judge