



PASS MINERALS, INC.
KIMINCO, INC.
PILOT PLANT, INC.
K. IAN MATHESON
(ON RECONSIDERATION)

171 IBLA 33

Decided January 12, 2007

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IBLA 2003-348R

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Petition for reconsideration of the Board's decision in Pass Minerals, 168 IBLA 183 (2006), affirming a decision of the Bureau of Land Management finding a willful mineral trespass in the sale of mineral material from a mining claim. N-63126.

Petition for reconsideration denied.

1. Rules of Practice: Reconsideration

Where, in their statement of reasons for appealing a willful mineral trespass decision, appellants expressly waived their opportunity to challenge the trespass charge, and they did not subsequently retreat from that waiver while the appeal was pending before the Board, they cannot claim on reconsideration that they were deprived of the opportunity to present their case as support for their petition for reconsideration.

2. Rules of Practice: Reconsideration

A party cannot create new information and argument for purposes of seeking reconsideration of a Board decision upholding a BLM willful mineral trespass decision by submitting a declaration composed of unsupported general assertions and denials that are inconsistent with the party's testimony in a related mining contest and information submitted to other government agencies. Where petitioners possess and have always possessed the information and evidence that might have been marshaled to support their appeal and the record also shows that they expressly waived their opportunity to

submit such information and evidence, they have failed to demonstrate “extraordinary circumstances” or “sufficient reason” and reconsideration is properly denied.

3. Rules of Practice: Reconsideration

Where petitioners expressly waived their opportunity to challenge a willful mineral trespass charge in their statement of reasons for their underlying appeal and they never attempted to present any issues relating to the trespass while the appeal was pending before this Board, reconsideration of the Board’s decision upholding BLM’s willful mineral trespass decision to recalculate the measure of damages on the basis of a nonwillful instead of a willful trespass is properly denied.

APPEARANCES: David A. Hornbeck, Esq., Reno, Nevada, for K. Ian Matheson, Pass Minerals, Inc., Kiminco, Inc., and Pilot Plant, Inc.; John W. Steiger, Esq., Office of the Regional Solicitor, Intermountain Region, U.S. Department of the Interior, Salt Lake City, Utah, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE PRICE

Pass Minerals, Inc. (PMI), Kiminco, Inc. (Kiminco), Pilot Plant, Inc. (Pilot), and K. Ian Matheson (collectively, petitioners) have petitioned for reconsideration and requested a stay of the Board’s decision in Pass Minerals, Inc., 168 IBLA 183 (2006). In that decision, we affirmed the August 1, 2003, decision of the Las Vegas (Nevada) Field Office (LVFO), Bureau of Land Management (BLM), finding PMI, Kiminco, Pilot, and Matheson in willful mineral trespass for the unauthorized removal of sand and gravel from public lands embraced in the Mijo 16 association placer mining claim located by appellants or their predecessors.^{1/} The decision sought damages of \$2,531,935 from petitioners for willful trespass, and \$20,315 and \$336,564 from Industrial and AAGC, respectively, for nonwillful trespass.

^{1/} The Mijo 16 is located in the NW¼ sec. 14, T. 23 S., R. 63 E., Mt. Diablo Meridian, in Railroad Pass, Nevada. The claim was located in 1983. See United States v. Pass Minerals, Inc., 168 IBLA 115, 118 n.1 (2006).

The decision was issued to PMI, Kiminco, Pilot, and Matheson, and to Industrial Construction (Industrial) and American Asphalt & Grading Company (AAGC), with which appellants had oral or written contracts. The copy of the trespass decision served on Industrial was returned undelivered. BLM believes that Industrial is now defunct. See Pass Minerals, 168 IBLA at 184 n.2.

In early April 2003, in a letter addressed to petitioners, BLM demanded payment of \$2,531,935 within 30 days of receipt thereof, failing which BLM would suspend all pending and authorized actions relative to their mining operations. When petitioners did not pay the debt, BLM issued an Order for Immediate Suspension of All Activities, N-74973 and N-71982 on May 12, 2006 (Suspension Order).^{2/}

On May 18, 2006, Matheson, PMI, Kiminco, and Pilot filed their Petition for Reconsideration (Petition) and Request for Stay (Stay).^{3/} Under 43 CFR 4.403, the Board may reconsider a decision “in extraordinary circumstances for sufficient reason.” The Petition first argues that petitioners should be permitted on reconsideration to address any and all issues that could have been raised in their appeal of BLM’s decision finding them in willful trespass. (Petition at 4-5.) In support, they argue that they have been denied an opportunity to respond to the trespass charge. Second, petitioners argue that the trespass decision was properly issued only to PMI, and that naming Matheson in his personal capacity, Kiminco, and Pilot, none of whom were named in the original Notice of Trespass, constitutes reversible error. *Id.* at 5-8. They note that the trespass decision neither stated a basis for naming these additional parties, nor included any findings that would support doing so.

Petitioners also request a stay of BLM’s demand for payment of damages, and ask us to stay our decision in 168 IBLA 183. However, petitioners’ arguments in support of the stay are actually directed to BLM’s demand for payment of damages, and not the Board’s decision in the underlying trespass appeal. *See* Stay at 8-9.

Petitioners supplemented and amended their Petition and Stay on June 19, 2006 (Supp. Petition), in which they relied on Gary L. Carter (On Reconsideration), 132 IBLA 46 (1995), to demonstrate good reason for reconsideration on the basis of “newly presented evidence.” (Supp. Petition at 5.) That evidence consists of a Declaration by Matheson in which he disputes the sufficiency of the trespass

^{2/} The Suspension Order pertains to petitioners’ operations (N-71982) and occupancy (N-74973) on the nearby Becki M dependent millsite. According to Matheson, Pilot is the owner and PMI is the operator, an assertion that is not entirely free of question. *See Pilot Plant, Inc.*, 168 IBLA 201, 202 n.2 (2006). At the request of counsel for petitioners, BLM agreed to suspend action on the May 12, 2006, Suspension Order until such time as the Board addressed the stay associated with this request for reconsideration. (Letter dated July 24, 2006, from Mark Chatterton, the LVFO Assistant Field Manager, to petitioners.)

^{3/} The Petition and Stay were submitted and paginated as a single document.

allegations as to himself, Pilot, and Kiminco.^{4/} Further, petitioners have added a new contention that questions the correctness of the measure of damages, *id.* at 10-15, arguing that the trespass was not willful and, on the basis of that assertion, they move the Board to reverse the underlying trespass decision and recalculate damages for nonwillful trespass. Petitioners renewed their request for a stay of BLM's payment demand and this Board's decisions, directing their arguments only to the former. *Id.* at 13-15.

BLM filed its Response to the Supp. Petition/Supp. Stay (Response) on September 26, 2006. BLM opposes the stay for the reasons enumerated when it opposed the initial stay of the underlying trespass decision requested on September 2 and October 14, 2003, and for the further reason that petitioners have no likelihood of success on the merits. Petitioners had indicated they would file a reply to BLM's Response, but they failed to do so in a timely fashion.^{5/}

Because BLM voluntarily suspended action to enforce its demand for payment by withholding further action on the Suspension Order, petitioners effectively have had the benefit of a stay. As we now reach the merits of the Petition, the request for a stay is moot and on that basis is denied.

We begin with petitioners' procedural arguments and the allegation that they have been deprived of the opportunity to "address" their appeal of the underlying

^{4/} Matheson's Declaration was dated June 14, 2006, and submitted as Ex. F to the Supp. Petition. The same Declaration was filed separately on June 26, 2006.

^{5/} Petitioners were granted two extensions of time to file a reply to BLM's Response. On Oct. 18, 2006, the Board extended the time to Nov. 13, 2006. Instead of filing a reply brief on Nov. 13, 2006, petitioners filed an untimely request for a further extension to Nov. 30, 2006, which the Board reluctantly granted, despite the absence of reasons compelling a further extension. We granted the extension, but we expressly stated that no further extensions would be granted and that any submission after that date would be disregarded. On Nov. 30, 2006, instead of the expected reply brief, the Board received a courtesy copy of a third request for a time extension via telecopier. Petitioners thus failed to file their reply brief by close of business on Nov. 30, and they failed to request a further extension before the time set in the Board's order expired. Therefore, on Dec. 1, 2006, the Board issued an order denying the third request for an extension and, in accordance with the Nov. 13 order, stated that it would begin its deliberations without petitioners' brief, and that any submission would be disregarded. On Dec. 4, 2006, petitioners provided a courtesy copy of their reply, which was not filed until Dec. 7, 2006. When they were received, those documents were immediately placed in a blue confidential envelope unread, and the envelope was sealed and placed in the case file.

trespass decision. In support of their argument, petitioners admit that they “in effect took the position that no action should proceed on the trespass appeal until the result of the appeal of Judge Sweitzer’s decision was known and finally resolved, including in federal court if necessary.” (Petition at 4; Supp. Petition at 4.) Petitioners advert to what they took to be BLM’s earlier assurance that it has “not only suspended further action on the trespass case (168 IBLA 183, 187-8 *supra*), [^{6/}] but also has directly linked its determination to the resolution of the contest case in the August 10, 2001 BLM-LVFO letter to Mr. Matheson (Exhibit B).” (Petition at 4; Supp. Petition at 4.) They also point to this Board’s order of October 29, 2003, in which we acknowledged that the trespass decision “depends in large part on the outcome of the appeal of the mining contest,” denied the request for a stay, and denied BLM’s request to consolidate the appeal of the trespass charge with the appeal of the mining contest docketed as IBLA 2003-268. (Oct. 29, 2003, Order at 3.) Petitioners allege that when we issued decisions in the mining contest and trespass appeals on the same date, “this Board effectively deprived Appellants of the opportunity to address this trespass appeal *after* the result of the mining contest was known.” (Petition at 5; Supp. Petition at 5.)

In response, BLM insists that it did not agree to “suspend” action on the trespass charge; rather, the initiation of the contest constituted “a continuation of BLM’s investigation of the trespass, and throughout the contest BLM consistently maintained that Appellants’ actions in selling the mineral materials constituted a trespass.” (Response at 8.) ^{7/} BLM further states that its determination to take no

^{6/} Specifically, we stated: “While the contest was pending, further action on this trespass case was suspended, although it was the facts of the trespass that furnished the basis for the charge in the contest complaint that the Mijo claims were not held in good faith.” Pass Minerals, Inc., 168 IBLA at 187-88. We used the term “suspend” more generically than petitioners’ argument might admit, and certainly did not intend to suggest that BLM had in any way abandoned its position that removal of sand and gravel for use as road base constituted a trespass. The record clearly establishes that BLM never yielded in its view that petitioners had committed a willful trespass.

^{7/} Our context for the “suspension” of further action on the trespass charge was derived from BLM’s response to three letters from Matheson to the State Director in July and August 2001. Chatterton replied to Matheson on the State Director’s behalf. After generally commenting on the way in which the Government pursues trespass allegations, Chatterton stated:

“The BLM will usually be able to make a final determination within 30 to 60 days after the initial “Notice of Trespass” has been issued. There are instances where a mineral trespass involves mining claims, such as in your case. If the central part of the determination for trespass is tied directly to the determination of validity of the

(continued...)

further steps to collect trespass fees and interest on those fees by acting on the Suspension Order “for the period between the date the decision required payment and the date of the Board’s decision on the merits” referred not to the contest appeal, but to the trespass appeal, and constituted “a gesture to assist the Board in resolving the stay petition, not because of a ‘direct link’ to the pending contest appeal.” Id.

Thus, BLM now claims that in its October 29, 2003, order the Board incorrectly viewed BLM’s statements concerning deference on collection of trespass fees and interest to be tied to the Board’s action on the contest appeal, rather than the trespass appeal, as intended by BLM. (Response at 8, n. 6.) While BLM never sought to clarify that alleged discrepancy, it is not determinative in this case because the Board issued its decisions in the mining contest case (168 IBLA 115) and the trespass case (168 IBLA 183) on the same date, and any reliance by petitioners on the Board’s October 29, 2003, order in that regard would be inconsequential.^{8/}

The fact that petitioners may have believed that the agreement with BLM suspended the trespass appeal until the contest appeal was resolved by the Board is not a basis for reconsideration of our decision in the trespass case. Docketed appeals are not suspended merely by inference, acquiescence, or a lack of action by the parties. To the contrary, formal action is required. Thus, a party typically moves to have the appeal suspended for good cause shown, and if this Board agrees, it issues an order directing suspension, the effect of which is to temporarily remove the appeal from the Board’s active docket. In this case, petitioners did not move this Board to suspend the appeal, BLM did not make such a request, and we did not suspend it on our own motion. Although the records in the several appeals involving petitioners amply demonstrate that Matheson has never hesitated to request information or

^{7/} (...continued)

mining claim, then the BLM will hold the decision in abeyance until the decision related to validity has been resolved.”

(Letter from Chatterton to Matheson dated Aug. 10, 2001, Ex. B to Petition at 3.)

^{8/} Nothing in the record plausibly states or suggests that BLM agreed, in form or spirit, to suspend all enforcement action in the trespass case until petitioners had exhausted all potential avenues of appeal in challenging the mining contest decision, including appeals to Federal courts. Chatterton’s Aug. 10, 2001, letter by its terms referred to “the determination of validity of the mining claim” and holding the trespass decision “in abeyance until the decision relating to validity has been resolved.” Without a document specifically acknowledging the extraordinary terms petitioners allege, we would not simply infer an agreement to defer action until all potential judicial appeals had been exhausted. Moreover, to our knowledge, petitioners have not appealed this Board’s decision affirming Judge Sweitzer’s contest decision, so their argument is at this juncture rhetorical.

demand clarification, and to do so often and regularly, here he never formally sought clarification from this Board regarding his asserted belief that the trespass appeal was in a suspended status. Without an order or even a request for clarification, petitioners cannot now feign surprise that, having reached an appeal on its docket, the Board proceeded to adjudicate it.

[1] Petitioners next claim that the Board deprived them of the opportunity to present their case when we adjudicated the trespass and contest appeals and issued decisions on the same date, denying them an opportunity to “address” the trespass. (Petition at 4; Supp. Petition at 5.) This argument is equally baseless. Petitioners, then proceeding as appellants, made a calculated decision not to prosecute their appeal and so advised the Board. Specifically, when they filed their notice of appeal and petition for stay on September 2, 2003, they stated that a complete statement of reasons (SOR) would be filed within 30 days. Pass Minerals, Inc., 168 IBLA at 188. In accordance with that representation, on October 14, 2003, acting *pro se* through Matheson, they filed a pleading captioned “Statement of Reasons to Reverse and Stay the Las Vegas Office Decision for Mineral Trespass,” which the Board accepted at face value. We quoted that pleading in full, the gist of which was that, in the absence of a final decision on the appeal of the contest decision, including a potential appeal to the Federal courts, BLM’s trespass allegation was premature. Id. Petitioners obviously intended to stand by the SOR they filed, because they neither indicated an intention to further supplement it nor subsequently requested leave to do so in the 30 months that the appeal was pending before us.

More to the point, petitioners not only elected to abandon their opportunity to file a more extensive SOR, they expressly and knowingly waived any challenges to the trespass charge that they might have, stating: “[u]ntil such a final adjudication is reached which may include recourse to the federal court system *we do not chose* [sic] *to challenge the validity of those persons and/or companies charged nor the accounting for the charges* although we consider it to be erroneous and inaccurate in all respects.” Id. (emphasis added). Therefore, having chosen this strategy of waiver and silence, petitioners cannot now claim that they were deprived of the opportunity to present their defenses to the trespass charge: the simple truth of the matter is that they eschewed and squandered the opportunity.^{2/}

[2] Petitioners attempt to walk away from the consequences of that decision by moving to re-open the appeal and raise any and all issues that could have been

^{2/} The fact that petitioners appeared *pro se* likewise affords no basis for relieving them of the consequences of their gambit. Despite the gravity of the charges, Matheson determined that he was qualified and able to go forward on petitioners’ behalf.

pursued, on the basis of “newly presented evidence” contained in Matheson’s Declaration. There are two serious problems with the Declaration.

First, the Declaration consists of only general denials of essential facts regarding the nature of the relationships to and among Matheson and the corporate petitioners. For example, Matheson states that the only “contractual relationship” was between Industrial and AAGC, and PMI. (Ex. F to Supp. Petition at 1, ¶ 3.) He denies that he controls the corporate petitioners, *id.*, ¶ 4, and he avers that petitioners “observe all corporate formalities in conducting their business,” *id.*, ¶ 5. However, he is unable to state with certainty whether any of the corporate petitioners paid stock dividends to him or his family. *Id.* Notably, no objective evidence or documentation was submitted to support any assertion contained in the Declaration. On the other hand, in its Response, BLM has gone to considerable length to identify the many instances in the contest hearing in which Matheson’s testimony on the subject of the way he used and operated his corporations casts substantial doubt on his present assertions. *See* Response at 11-51. We have again read Volume 25 of the contest hearing transcript (Apr. 27, 2001) to reacquaint ourselves with this aspect of the proceedings before Judge Sweitzer. Matheson’s testimony undeniably supports the conclusion that the corporate parties are little more than Matheson’s alter egos. As the Court noted in *Silas v. Babbitt*, 96 F.3d 355, 358 (9th Cir. 1996), “[o]ne cannot create an issue of fact by simply contradicting one’s own previous statement. [Citations omitted].” We are satisfied that Matheson’s present, unsupported declarations and denials are simply not adequate to overcome that testimony or Judge Sweitzer’s assessment of his demeanor and credibility.

In addition, BLM has supplied other evidence that further undermines the credibility of Matheson’s Declaration. In particular, BLM provided a copy of the Registration Statement submitted to the U.S. Securities and Exchange Commission for Searchlight Mining Corporation, another corporation in which Matheson is substantially and directly involved. Among other things, that Registration Statement avers that Matheson controls PMI and Kiminco. (Attachment 1 to Response, Form SB-2 dated April 26, 2006, at 24.) Attachment 2 to BLM’s Response consists of downloads of corporate information for each of the corporate petitioners apparently maintained by the Nevada Secretary of State, and these similarly tend to confirm BLM’s conclusion that the corporate petitioners are nothing more than Matheson’s alter egos. In such circumstances, a party cannot create new information and argument for purposes of seeking reconsideration by submitting a declaration composed of unsupported general assertions and denials that are inconsistent with the party’s testimony in a related mining contest hearing and statements made to other government agencies.

The second difficulty is that Matheson and the corporate petitioners possess and have always possessed the information, evidence, and argument that might have

been marshaled to support their belated challenge, yet they never raised or pursued it, not immediately when the trespass decision was issued or at any time during the pendency of the appeal. They have offered no explanation of their failure to do so, a failure that is, we note, entirely consistent with the waiver stated in the SOR. What arguments they now make with respect to reliance on BLM's suspension of activity and their claim of surprise and prejudice because the Board decided this and related appeals on the same date are spurious. Where a party submits information and arguments that could have been raised while the appeal was pending, and the record also shows that they expressly waived their opportunity to do so, they have failed to demonstrate "extraordinary circumstances" or "sufficient reason" and reconsideration is properly denied. See Dugan Production Corp. (On Reconsideration), 117 IBLA 153, 155 (1990), and cases cited.

[3] Petitioners' final argument is that the trespass was not willful, and that it is appropriate to reverse BLM's decision so that damages can be recalculated using the measure of damages applicable to nonwillful trespass. This contention is not supported by the record, which established that petitioners acted freely and purposefully when they continued to sell sand and gravel from the Mijo 16 claim after BLM had repeatedly informed them that they had no authorization to do so. Petitioners attempt to recast the circumstances by claiming their actions were attributable to a "long standing, but good faith, disagreement" with BLM, but this is unavailing because "the essence of the charge is disposal of common variety mineral material without BLM's authorization to do so." Pass Minerals, Inc., 168 IBLA at 189. In any event, however, petitioners raise questions that lie at the heart of the defense they knowingly abandoned when they chose not to contest "the accounting for the charges." As they made no attempt to resurrect their right to present their case while the appeal was pending, they have shown no reason to reconsider the decision in 168 IBLA 183.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the Petition for Reconsideration is denied and the Request for a Stay is denied as moot.

T. Britt Price
Administrative Judge

I concur:

Bruce R. Harris
Deputy Chief Administrative Judge