

JOHN W. POPE

IBLA 71-174

Decided August 29, 1974

Appeal from decision of Oregon State Office dismissing private contest complaint OR 7058 (Wash.)

Affirmed.

Administrative Procedure: Standing--Contests and Protests: Generally--Mining Claims: Possessory Right--Rule

Summary dismissal of a private contest of a mining claim will be affirmed where the contestant fails to show that he is claiming an adverse title or interest in the land which would afford him standing to maintain such a contest. Jurisdiction over disputes between rival mining claimants to the same land is reserved to the courts. A private contest or protest cannot be the means of preserving a surface conflict lost by judgment of the court in an adverse suit.

APPEARANCES: Carl B. Luckerath, Seattle, Washington, for appellant; Donald H. Bond, Halverson, Applegate, McDonald, Bond, Grahn & Wiehl, Yakima, Washington, for appellee.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

John W. Pope appeals from a decision of the Oregon State Office, dated December 28, 1970, dismissing his private contest complaint filed pursuant to 43 CFR 1852.1-3 (1970).

The dispute in question concerns land located in the Snoqualmie National Forest, Yakima County, Washington. From August 16, 1951, through December 21, 1962, appellant was a permittee under a special use permit issued by the Forest Service which allowed him to remove a specified amount of stone from a given area. On August 1, 1960, Kenneth McClarty filed a notice of location of the Snoqueen Placer Mining Claim on land which appellant alleges was covered by his

special use permit. McClarty procured an injunction from the Washington Superior Court for King County restraining appellant from access to the area. As a result, the Forest Service refused to renew appellant's permit. Appellant contends, however, that the Forest Service preserved to him a preferential right of reissuance to the permit if and when McClarty's claim was disqualified.

On November 6, 1970, appellant filed a private contest complaint in which he contended that McClarty's claim was invalid for the following reasons:

(1) The alleged discovery was a usurpation of a prior finding or discovery by contestant who was in possession, working the claim under a Special Use Permit, seeking to establish a sufficient market to qualify the stone as having a special value.

(2) Under the state of the law as it existed at the time of the Snoqueen locations building stone was treated and accepted as a common variety, subject exclusively to the Common Varieties Leasing Act of 1955.

(3) At the time of the alleged discovery the stone involved had not been demonstrated to have a special value.

(4) Any discovery alleged, lay wholly without the boundaries of the Snoqueen as located. Any portion of the Snoqueen claim lying within the area of the Pope Special Use Permit, or of the Washington State Highway pit and permit area must be removed from the Snoqueen claim for the reason that such areas were not open or available for location.

(5) That contestant has a special right and interest in the property either (a) as an established Special Use Permittee of the Forestry Service, or (b) as the original discoverer and locator of the placer mining claim involved.

The State Office summarily dismissed this contest complaint for failure to meet all the requirements of the regulations (now recodified in 43 CFR 4.450). The decision specified the following:

1. Contestant has not shown that he is qualified to bring a contest against the Snoqueen placer mining claim. 43 CFR 1852.1-1 states in pertinent part 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 for any reason not shown by the records of the Bureau of Land Management." Contestant indicates merely that he hopes to obtain a special use permit from the Forest Service to sell rock from this land. In UNITED STATES STEEL CORPORATION, A-27271, September 10, 1956 (63 I.D. 318), the Secretary indicated that one who merely hopes to lease land is not qualified as a contestant under the provision quoted above.

2. Contestant has not furnished the statement of the law under which he claims or intends to claim title to or an interest in the land, as required by 43 CFR 1852.1-4(a)(5).

3. Contestant furnished no corroboration of his allegations that he had located a claim prior to that of the contestee. Contestant's statement of corroboration cannot be construed as meeting the requirements of 43 CFR 1852.1-4(c).

4. Contestant did not furnish the correct address of the office in which his complaint was filed. 43 CFR 1852.1-4(a)(8).

5. Contestant did not furnish a proper notice to contestee as required in 43 CFR 1852.1-4(a)(9).

Pope filed his appeal on January 20, 1971. Referring to points one and two of the State Office's decision, appellant reiterates his contention that McClarty "jumped his claim." He asserts that he is entitled to protection and preservation of his occupancy while completing his discovery and establishing in the market that stone has a unique property imparting a special and distinct value, thereby exempting it from the Act of July 23, 1955, supra. Appellant alleges that Item 3 of the decision is a denial of due process because he is the only witness to certain allegations of fact. Therefore, to deny him the right to be heard through his statement is a denial of due process.

Appellant asserts that Items 4 and 5 are "hypertechnical". Regarding the incorrect address of the State Office, appellant emphasizes that the Bureau did in fact receive the documents in question. As for notification, appellant asserts that his protest complaint expressly notified contestee that allegations of the complaint would be taken as confessed unless contestee's answer was served and filed within 30 days in the language of 43 CFR 1852.1-4(a)(9).

On February 23, 1971, McClarty filed his answer in which he prayed that the decision of the State Office be sustained.

The State Office acted correctly in dismissing the private contest complaint. In United States v. Kenneth McClarty, 17 IBLA 20, 81 ID. 472 (1974), we considered concurrently this appeal and that filed by McClarty, and the two decisions are issued simultaneously. In the McClarty decision we considered some of the issues raised in this appeal. We noted that Pope's interest in the claim derived from the special use permit issued to him by the Forest Service pursuant to the Materials Act of July 31, 1947, 30 U.S.C. 601 et seq. (1970), and that this statute expressly provides that it constitutes authority to permit removal only of those materials which are not subject to disposal under the mining law. Having determined that the stone was a mineral subject to location under the mining law in the McClarty decision, we have foreclosed the right of Pope to acquire the same stone under the Materials Act. Also in the McClarty decision we noted that Pope's occupancy of the land under his permit is inconsistent with his claim that he was asserting title thereto under the mining law.

Appellant's assertion that he was on the land as the locator under the mining law rather than as a permittee is rejected for additional reasons. He has not alleged any compliance with the procedures for locating a claim under the laws of the United States or the State of Washington, such as staking the claim or filing a location notice. He did not refuse to pay the price required by the permit for removal of the stone, as he surely would have done were he claiming title to it under the mining law. Moreover, in his "Statement of Facts" which is incorporated into his private contest complaint Pope asserts that at the time McClarty filed his location notice Pope . . . "was in possession under a Special Use Permit . . ."

Even if Pope could establish that he had located a mining claim on this deposit, he would not thereby be entitled to maintain a private contest. Jurisdiction of disputes between rival mining claimants is reserved to the courts. 30 U.S.C. § 30 (1970); 30 U.S.C. § 53 (1970); Estate of Arthur C. W. Bowen, 14 IBLA 201 (1974). The controlling regulation, 43 CFR 3872.1(a), provides, in pertinent part:

At any time prior to the issuance of patent, protest may be filed against the patenting of the claim as applied for, upon any ground tending to show that the applicant has failed to comply with the law in any matter essential to a valid entry under the patent proceedings. Such protest cannot, however, be made the means of preserving a surface conflict * * * lost by the judgment of the court in an adverse suit. (Emphasis added)

See also 43 CFR 3871.3 et seq.

Although our record does not include a copy of the judgment entered by the Superior Court of the State of Washington, references to it by Pope, McClarty and the Bureau are reflected by the record, and all appear to agree that the Court recognized McClarty's right to occupy the claim and enjoined Pope from entering thereon. The regulation, supra, makes it clear that Pope cannot use this means of preserving the conflict lost by the Court's judgment.

Finally, we note that Pope filed his private contest complaint in the Bureau's Oregon State Office on October 5, 1970. The special use permit issued to him by the Forest Service had expired December 21, 1962, and the Forest Service had thereafter refused to renew it, allegedly because of the ruling by the Superior Court. Therefore, at the time he filed his complaint Pope had held no right under the special use permit for nearly eight years.

We base our decision to affirm the State Office decision to dismiss the complaint on appellant's failure to show that he has an interest in the land which would afford him standing to maintain a private contest, as required by 43 CFR 4.450-1, which provides that one initiating such a contest must claim title to or an interest in land adverse to any other person claiming title to or interest in such land. 1/ Therefore, a discussion of the other alleged deficiencies in the State Office decision is unnecessary.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals, by the Secretary of the Interior, 43 CFR 4.1, the decision of the State Office is affirmed.

Edward W. Stuebing
Administrative Judge

I concur:

Douglas E. Henriques
Administrative Judge

1/ A second category of persons may initiate a private contest but this category consists only of persons seeking to invalidate homestead or other agricultural entries.

JUDGE THOMPSON CONCURRING IN PART, DISSENTING IN PART:

The complaint filed by John W. Pope against Kenneth McClarty and Burton A. Lehman, as contestees, and amendments to the complaint were all captioned "Protest Complaint." The Bureau of Land Management treated these documents as a private contest and summarily dismissed the contest for the reasons set out in the majority opinion. As Pope did not and had not had a permit to the land for some eight years, he could not presently show a claim of title to or interest in the land as required by the regulations, now 43 CFR 4.4501. To this extent I concur with the majority that the complaints were subject to dismissal as a private contest under the regulations. However, I do not believe this should terminate the adjudication of the complaint.

In the companion case, United States v. McClarty, decided today on the Government's contest against the McClarty mining claim in question here, I pointed out that the Administrative Law Judge in that proceeding declined an offer of proof by Pope, who intervened in the proceeding, to show that the workings which McClarty relies on as exposing an uncommon variety of building stone are outside the boundaries of McClarty's claim. Mr. McClarty's attorney strenuously objected to such proof in that proceeding asserting that it could be presented in the private contest brought by Pope. He now contends that Pope has no standing to contest the claim.

Even though a person may not meet the technical requirements for a contest, their charges going to the validity of a mining claim may be treated as a protest and appropriate action taken thereon. 43 CFR 4.4502. I would have Pope's complaint treated as a protest and consolidate this case with the Government's case for further hearing to permit evidence on the matters I discussed in the McClarty decision. For this reason, I dissent to action which may have the effect of precluding further consideration of certain matters raised by Pope going to the validity of the McClarty claim.

Pope has changed from his original position that the deposit of stone is a common variety of stone to one indicating that it is now an uncommon variety. He also asserts rights as a locator under the mining laws but, as the majority indicates, he has furnished no proof that he has complied with the mining law with respect to making a location thereunder. I agree with the majority to the extent that

it rules this Department would not entertain a private contest to determine possessory rights as between two rival mining claimants. Congress has prescribed that the courts may properly determine questions of possession or damages to possessory interests under mining claims. 30 U.S.C. § 539 (1970). Such determinations are not affected by the fact that the paramount title is in the United States and do not affect that title. The provisions of the mining laws with respect to adverse proceedings, 30 U.S.C. §§ 29, 30 (1970), and regulations thereunder 43 CFR 3871, are applicable where patent applications have been filed, notice published, etc. This has not been done in our case. Even were those provisions applicable here, however, regulation 43 CFR 3872.1(a), cited by the majority, expressly permits consideration of a protest filed against a mining claim for reasons which go to the validity of the claim, apart from any asserted conflicting right in the protester. ^{1/}

Had Pope brought his private contest while his permit was still extant, he would have had standing to bring the private contest. In Duguid v. Best, 291 F.2d 235, 240, 241 (9th Cir. 1961), a holder of a special land use permit from the Forest Service initiated a private contest against a mining claimant before the Department of the Interior; the mining claimant had brought suit in a State court for damages to his possessory interest in the mining claim by the permittee, and sought an injunction in the federal court to bar the contest proceeding. The court refused the injunction and upheld the Department of the Interior's regulations governing private contests (similar to those now in effect), saying:

* * * We regard the private contest proceedings as a means or method which is designed to assist the Secretary of the Interior in carrying out his duties to protect the interests of the government and the public in public lands, in that by such method there may be called to the attention of the Bureau of Land Management invalid claims to title or interest in public lands, the invalidity of which does not appear on the records of the Bureau of Land Management and of which the Bureau may be without knowledge. If a claim of title to or interest in public land may be invalidated in a proceedings [sic] initiated by the government we are unable to see why the same result may not be reached in a proceedings [sic] initiated by a private person.

^{1/} Where one cannot show a possessory interest in land so as to be able to invoke 30 U.S.C. § 53, he must seek administrative relief and exhaust the administrative remedies before seeking court action to show that a claim under the mining laws is invalid. Ryan v. Pitkin Iron Corp., 444 F.2d 717 (10th Cir. 1971).

We do not construe the provisions of Section 221.51 to authorize an adjudication on the superiority of possessory interests as between claimants. In our view, controversies between claimants of possessory interests on public lands must be determined by the courts. See Title 30 U.S.C.A. § 53, *supra*.

Since the purpose and end result of a private contest operate to protect the government against invalid claims of title to or interest in public lands, we are convinced that such regulation is valid.

291 F.2d 241, 242.

The rationale of the Court in upholding the regulations for private contests is equally applicable to the reasons I believe Pope's protest should be entertained and further evidentiary proceedings be conducted with respect to McClarty's claim. In this respect I note that Pope's position is different from other persons who can claim no title or interest in land. He has asserted development of roads into the area and of the deposit itself and has asserted that the Forest Service will give him a preferential right to a further permit. He is thus in a class above an ordinary protester tester who has had no stake in the proceedings, and thus his participation as an intervenor is appropriate.

Joan B. Thompson
Administrative Judge

