

**Editor's note: Appealed – dismissed (with stipulation that Wilderness Society could intervene in contest), sub nom. Wilderness Society v. Andrus, Civ.No. 79-0296 (D.D.C. May 30, 1979)**

UNITED STATES  
v.  
UNITED STATES PUMICE CO.

IBLA 78-529

Decided October 5, 1978

Appeal of interlocutory ruling of Administrative Law Judge Harvey C. Sweitzer denying petition of appellants, The Wilderness Society and others, to intervene in Government mining claim contest.

Affirmed and remanded.

1. Administrative Procedure: Standing–Intervention–Mining Claims: Contests–Rules of Practice: Government Contests–Rules of Practice: Private Contests

Intervention, by right, as a full party in a contest proceeding is only recognized where the individual seeking intervention has the necessary interest to maintain a private contest independently under 43 CFR 4.450-1.

2. Administrative Procedure: Standing–Intervention–Mining Claims: Contests–Rules of Practice: Government Contests–Rules of Practice: Private Contests

The extent of the participation in a contest hearing to be afforded "interested individuals" who do not have a sufficient interest to maintain a private contest is committed to the sound discretion of the administrative law judge. Among the factors which are properly considered are: the desires of the original parties; the likelihood that the party seeking intervention will provide information which would not be forthcoming without its participation; and the cost which must be borne by both the contestant and the contestee by the nature and scope of the intervention granted.

APPEARANCES: Frank J. Barry, Esq., Eugene, Oregon, for appellants; Donald A. Haagensen, Esq., and Rockne Gill, Esq., for contestee; Arno Reifenberg, Esq., and Richard L. Fowler, Esq., for contestant.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

This case originated with the filing of a mining claim contest by the Bureau of Land Management (BLM) on behalf of the United States against the contestee, United States Pumice Company, with respect to certain mining claims identified as the Hermana and Hermana Nos. 1 through 9, Oregon, located in unsurveyed T. 17 S., R. 8 E., Willamette meridian, Oregon, within the Deschutes and Willamette National Forests.

The contest complaint alleges, among other things, the lack of a discovery of valuable minerals on the claims. The issue has been joined by the filing of an answer on behalf of the contestee denying the allegations and alleging the existence of a discovery on each of the claims. Prior to a hearing in the contest, a motion to intervene was filed on behalf of the The Wilderness Society and others. <sup>1/</sup>

This motion came before Administrative Law Judge Harvey C. Sweitzer at a prehearing conference on June 13, 1978. Following consideration of the briefs and oral argument presented on behalf of contestant, contestee, and the parties petitioning to intervene, the judge denied the motion. The Wilderness Society and others seeking to intervene filed a notice of appeal on July 7, 1978, from the ruling of Judge Sweitzer and requested interlocutory administrative review of the ruling. Appellants allege that the ruling involves a controlling question of law and that an immediate appeal thereof will materially advance the final decision in the case. Judge Sweitzer has certified his interlocutory ruling on the motion to intervene to this Board pursuant to 43 CFR 4.28.

Appellants assert that they meet the standing tests established in Sierra Club v. Morton, 405 U.S. 727 (1972), and Association of Data Processing Service Organizations v. Camp, 397 U.S. 150 (1970), in that they have alleged that the challenged action will cause injury in fact and that the interests which they seek to protect are within the zone of interest protected by the statute in question. Appellants argue that the lack of express provision for intervention in the regulations governing contest proceedings is not a bar to intervention because

---

<sup>1/</sup> In addition to The Wilderness Society, the groups seeking intervention are: The McKenzie Flyfishers, The Obsidians, The Friends of the Three Sisters Wilderness, The Oakridge Audubon Society, The McKenzie Guardians, The Federation of Western Outdoor Clubs, The Sierra Club, Northwest Environmental Defense Center, The Oregon Student Public Interest Research Group, The Survival Center and the Oregon Environmental Council. Appellants herein will be treated as a single entity for the purposes of this decision.

appellants have the required standing, citing National Welfare Rights Organization v. Finch, 429 F.2d 725, 734-35 (D.C. Cir. 1970).

A contest complaint filed by the appellants has been incorporated by reference in the brief in support of their motion. Appellants allege in the complaint that their members use land in the vicinity of the claims for such activities as fishing, camping, and outdoor recreation in general. Appellants assert that their interest would be adversely affected if either mining operations or other commercial development are permitted in the area.

Contestee argues in opposition to the motion that no provision is made in the regulations for intervention by a private party in a Government contest. Counsel for contestee alleges that appellants do not have standing to file a private contest because they claim neither title to the land nor an interest therein adverse to contestee as defined in the regulations at 43 CFR 3871.2 and 43 CFR 4.450-4(a)(5). Further, contestee contends that appellants do not meet the standing requirements of the Camp case, supra, because the interests sought to be protected are not within the zone of interest protected by the statute involved in this mining contest, the Mining Act of 1872, as amended, 30 U.S.C. §§ 21-54 (1976). Contestee argues that the sole issue in the proceeding is whether it has complied with the mining laws, citing United States v. Kosanke Sand Corporation (On Reconsideration), 12 IBLA 282, 80 I.D. 538 (1973).

The brief filed for contestant alleges that an intervenor must have a property interest in the land involved. State of California v. Doria Mining and Engineering Corporation, 17 IBLA 380, 386 (1974), aff'd, Doria Mining & Engineering Corp. v. Morton, 420 F. Supp. 837 (1976). Counsel for contestant further argues that appellants have made no showing that they are within the zone of interest protected by the mining laws. Contestant argues that appellants do not come within the scope of the exception to the property interest requirements allowed in United States v. Pittsburgh Pacific Co., 30 IBLA 388 (1977), where the State was allowed to present evidence regarding environmental requirements pertaining to mining operations. Finally, counsel for contestant cites the holding of this Board in United States v. Kosanke Sand Corporation (On Reconsideration), supra, to the effect that a general concern for the environment of the area and application of the mining laws is not sufficient standing to be allowed to participate as parties in a mining claim contest proceeding, but that such interest will justify allowing those interested to participate as amici curiae to the extent of filing briefs before the administrative law judge and before the Board of Land Appeals in the event that an appeal is pursued by either party.

The issue raised by this appeal is whether a third party has the right to intervene, as a full party, in a proceeding instituted by the Government as the public representative to challenge a mining claimant's assertion of private rights in the public lands where the

third party is not claiming any private right in the land but, rather, asserts rights as a user shared with the public in general.

[1] Certain observations are necessary to provide a decisional framework for the resolution of this appeal. Appellants readily admit that there do not presently exist specific regulations relating to the granting of the motion to intervene. See also United States v. McCall, 2 IBLA 64, 75, 78 I.D. 71, 81 (1971). Nevertheless, they assert that the decisional law of both this Board and the Federal courts indicate that the absence of specific procedures is an insufficient justification for the rejection of their motion to intervene. They place great reliance both on this Board's decision in United States v. Pittsburgh Pacific Company, supra, and the District of Columbia Circuit Court's decision in National Welfare Rights Organization v. Finch, supra. These decisions are examined, infra.

While this Board does not have regulatory provisions for intervention, 2/ such provisions do exist in the special regulations relating to procedures before the Board of Surface Mining Appeals and the Alaska Native Claims Appeal Board (ANCAB). The ANCAB provisions are found at 43 CFR 4.909(b), and provide: "Any person may petition the Board to intervene in an appeal. Upon a proper showing of interest under § 4.902, such person may be recognized as an intervenor in the appeal." The section of the regulations cited, 43 CFR 4.902, requires the claim of a property interest in the land involved.

On the other hand, the procedural regulations of the Board of Surface Mining Appeals state that any person may file for leave to intervene at any stage of a proceeding (43 CFR 4.1110(a)), and that the petition shall be granted where either there exists a statutory right by the individual to initiate the proceeding or the individual "has an interest which is or may be adversely affected by the outcome of the proceeding." 43 CFR 4110(c). Thus, while intervention before ANCAB is limited to those who could pursue an action in their own right, the regulations of the Board of Surface Mining Appeals permit intervention not only by such individuals, but also by those who have "an interest" which may be affected by the adjudication.

The third point which we would make is that the procedure involved herein is purely adversary. When the Government brings a contest complaint against a mining claim it asserts, by necessity, that the claim is invalid for certain reasons. The remedy it seeks is nullification of the claim. United States v. Carlile, 67 I.D. 417 (1960). Indeed, as the Supreme Court has recognized, the Department

---

2/ We would note, however, that intervention in hearings relating to section 3 grazing appeals is permitted under 43 CFR 4.471 upon "a proper showing of interest" to the administrative law judge. Reference should also be made to Doria Mining & Engineering Corp. v. Morton, supra at 840, and 43 CFR 4.452-5.

of the Interior is vested with the affirmative responsibility to guard the public domain "to the end that valid claims may be recognized, invalid ones eliminated, and the rights of the public preserved." Cameron v. United States, 252 U.S. 450, 460 (1920). It was recognition of the essentially adversary nature of the proceeding which was instrumental in the original establishment of an independent Office of Hearings and Appeals which would be outside the prosecutorial Office of the Solicitor. See Oil Shale Corp. v. Morton, 370 F. Supp. 108, 129 (D. Colo. 1973). Thus, cases cited by the appellants which relate to rulemaking activities of administrative agencies are not necessarily relevant to the matter before us.

Finally, we must recognize that, to a certain extent, even the concept of "intervention" does not easily lend itself to specific definition. Traditionally, upon the granting of intervention, the intervenor was viewed as having all of the attributes of a party to a proceeding. See generally 59 Am. Jur. 2d Parties § 177 (1971). Included in this status was the right to independently pursue a view of the issues totally at odds with those of the original parties, and to file an appeal from an adverse decision, even when the original parties were content with the decision rendered below. See 59 Am. Jur. 2d Parties § 183 (1971). Recent developments, however, have recognized a metamorphosis in the nature of an intervenor's rights, particularly in administrative law. No longer can it be baldly asserted that any intervenor must, by necessity, be vested with the full rights of a party. On the contrary, many regulatory agencies have adopted specific regulations relating not only to intervention but to the degree of intervention which may be permitted. See, e.g., 17 CFR 201.9; 16 CFR 3.14. Moreover, it has been noted that "intervention in rulemaking type proceedings is more permissive and frequent than intervention in adjudicatory matters." SENATE COMM. ON GOVERNMENTAL AFFAIRS, PUBLIC PARTICIPATION IN REGULATORY AGENCY PROCEEDINGS, Vol. III, S. DOC. NO. 95-71, 95th Cong., 1st Sess. 45 (1977).

Mindful of these considerations, we turn to the issues pressed on this appeal. To the extent to which appellants are proceeding on an assumption that intervention in the instant appeal is a matter of right, we must reject that contention. In our view, intervention, as a matter of right, exists only in those cases where the individual seeking to intervene could independently maintain the action in which he seeks to participate. While the regulations, as we have noted supra, are silent on the question of intervention, they provide explicit requirements relating to who may file a private contest. The regulations limit such actions to those who claim "title to or an interest in land adverse to any other person claiming title to or an interest in such land." 43 CFR 4.450-1. Appellants apparently contend that because they possess the requisite nexus of interests so as to confer standing, they must be adjudged to be full intervenors as

a matter of right. The conclusion which they advocate, however, does not flow from the premise. <sup>3/</sup>

Standing to bring private contests under 43 CFR 4.450-1 has been recognized where a party holds an easement for highway and a special use permit issued by the United States. State of California v. Doria Mining and Engineering Corporation, *supra*. Standing has been recognized where a party holds a special use permit issued by the Forest Service for construction of a dam and spillway on national forest land. Duguid v. Best, 291 F.2d 235 (9th Cir. 1961), *cert. denied*, 372 U.S. 906 (1963). A party has also been held to have standing to bring a private contest where he is the holder of a grazing lease issued pursuant to section 15 of the Taylor Grazing Act of 1934, as amended, 43 U.S.C. § 315m (1970). Thomas v. DeVilbiss, 10 IBLA 56, 57 (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). Finally, the Board has consistently ruled that those with an interest in the surface estate have standing to bring a private contest against a mineral entryman. See City of Phoenix v. Reeves, 14 IBLA 315, 81 I.D. 65 (1974), *aff'd*, Reeves v. Morton, Civil No. 74-117 PHX-WPC (D. Ariz. 1974); Continental Oil Co. v. Aztec Exploration and Development Co., 32 IBLA 1 (1977), appeal pending Aztec Exploration & Development Co. v. United States, Civil No. 77-827 (D. Ariz.).

The regulations do not, even as they are written, foreclose participation of individuals who are vested with the requisite standing, but who cannot show a claim of title to or interest in the land. On the contrary, 43 CFR 4.450-2 provides a mechanism for those who cannot meet the requirements necessary to support the filing of a private contest to protest actions proposed to be taken in any proceeding before the Bureau. The thrust of this regulatory admixture is clear. An individual may be either a private contestant or a protestant, his status depending upon the nature of the interest which he seeks to vindicate. In either case, however, the individual must have the requisite standing. See Crooks Creek Commune, 10 IBLA 243 (1973). The fact that appellants may have the necessary nexus of concerns so as to confer standing in some theoretical sense is not dispositive of the question whether they are entitled, within the terms

---

<sup>3/</sup> Moreover, the premise itself represents a confusion of concepts. "Standing," by itself, has little meaning. It is only within the context of a particular proceeding that it gains significance. For example, standing to intervene in an ongoing administrative action and standing to obtain judicial review partake of different considerations. Thus, courts have held that the fact that an individual had standing as a party before an agency is not dispositive of the question of whether it has standing to seek judicial review. Pepsico, Inc. v. FTC, 472 F.2d 179, 186 (D.C. Cir. 1972), *cert. denied*, 414 U.S. 876 (1973). Reference must, therefore, always be made to the specific proceeding in which standing is being sought.

of the regulations, to bring a private contest. A finding that an individual has standing is an a priori requirement for an individual to raise any substantive matter within the Department's appellate structure. Crooks Creek Commune, supra.

We should not lose sight of the fact that the purpose of the private contest regulation is:

To assist the Secretary of the Interior in carrying out his duties to protect the interest 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. [Emphasis supplied.]

Duguid v. Best, supra at 241-42.

Clearly within the confines of the instant appeal, the possibility that the claims are invalid can scarcely be said to be a matter which has not come to the attention of the Bureau. But in the larger sense, the Secretary, when these regulations were promulgated, determined that it was within the public interest to permit private contests where an individual claimed "title to or an interest in land adverse to any other person claiming title to or an interest in such land," primarily as a mechanism which might aid him in the administration of his duties. He, in effect, broadened the rights of certain individuals as an administrative mechanism to supplement Departmental activities. The right to bring a private contest, however, is by regulation afforded to a specific category of individuals, and appellants herein are simply not included within that class. <sup>4/</sup>

Nothing in National Welfare Rights Organization v. Finch, supra, compels a different result. On the contrary, the court noted that one must look to the relevant statute as a conduit of standing and that persons who were beneficiaries of a statutory scheme are possessed of standing. Indeed, in that case, the court specifically declined to reach appellant's contention of a legally protected

---

<sup>4/</sup> The "interest in the land" must be construed within the ambit of the phrase "title to." Past Board decisions, cited in the text, have consistently examined the nature of the claim to the land which the private contestant has sought to protect. To allow appellants herein to fit within the ambit of the private contest regulations would effectively destroy any limitations whatsoever. The doctrine of ejusdem generis is, we believe, entirely applicable here. The "interest in the land" to which the regulation refers is an interest which must be grounded on a specific statutory grant.

interest, determining instead their standing was "contingent upon a legislative grant of a benefit." *Id.* at 734 n. 33. Appellants herein attempt to bring themselves under the rubric of this language. But in point of fact, the only matters to be determined are those relating to a discovery under the Mining Act of 1872, as amended. Appellants are not arguably the intended beneficiaries of the Act. Such acts as the National Environmental Policy Act, 83 Stat. 852, 42 U.S.C. § 4321 et seq. (1976), and the Wilderness Act, 78 Stat. 890, 16 U.S.C. § 1131 et seq. (1976), did not purport to amend the Mining Act. See United States v. Kosanke Sand Corporation (On Reconsideration), *supra*. To the extent that environmental costs are relevant, they go to the question of marketability at a profit, an issue which is based intrinsically in the question of discovery. See United States v. Coleman, 390 U.S. 599 (1968). Thus, we do not read National Welfare Rights Organization v. Finch, *supra*, as requiring that appellants be accorded standing as a full party, as a matter of right, in the instant matter.

[2] This conclusion, however, is not dispositive of the appeal. Beyond the question of whether appellants can intervene as a party as a matter of right lies a question relating to appellants' intervention with rights something less than those which appertain to a party. Judge Sweitzer permitted appellants to appear as "amici curiae" for the purpose of filing briefs. Appellants apparently perceive "intervention" and "amicus curiae" status as fundamentally different. But as we noted earlier, within the administrative context, intervention is now more aptly seen as embracing an entire range of rights, extending from the ability to file briefs to the right to present one's own evidence and cross-examine the witnesses presented by other parties. Viewed from this perspective, Judge Sweitzer actually permitted limited intervention on the part of the appellants. We will, therefore, treat appellants' objections as opposition to the limited scope of their participation.

Initially, we note that nothing contained in either United States v. Pittsburgh Pacific Company, *supra*, or United States v. Kosanke Sand Corporation (On Reconsideration), *supra*, is contrary to the Administrative Judge's decision herein. Both cases merely stand for the proposition that participation by certain individuals is permissive, and the extent of participation allowed will be determined by the interests and expertise of those who seek participation. Thus, in Kosanke, the East Bay Regional Park Corporation had filed an application under the Recreation and Public Purpose Act, 43 U.S.C. § 869 et seq. (1970). Viewed in the light of past Board precedents relating to standing to bring a private contest, the East Bay Regional Corporation clearly would have had the requisite authority to bring a private contest and the Board recognized this by granting them standing as a full party. By way of contrast, in Pittsburgh Pacific, the State of South Dakota, owing to various environmental considerations relating to operations of the mining claims, was accorded limited

party status to "offer new evidence as to environmental requirements, the cost of compliance, and other pertinent factors." United States v. Pittsburgh Pacific Company, *supra* at 388, 84 I.D. at 291.

Similarly, we find that none of the court cases cited by appellants stand for the proposition that appellants must, even as a matter of discretion, be accorded full participation in an adversary hearing. To our mind, the extent of participation which may be accorded rests in the sound discretion of the judge. There are many factors which might influence the judge in his determination of the degree of participation which should be afforded those in appellants' position. Among such proper concerns are the desires of the original parties, the likelihood that the parties seeking intervention will provide information which would not be forthcoming without their participation, and the cost which must be borne by both the contestant and the contestee by the nature and scope of the intervention granted. <sup>5/</sup> We believe that the decision of Administrative Law Judge Sweitzer strikes a fair balance between competing interests and decline to set this ruling aside.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the ruling appealed from is affirmed.

---

James L. Burski  
Administrative Judge

We concur.

---

Newton Frishberg  
Chief Administrative Judge

---

Douglas E. Henriques  
Administrative Judge

---

<sup>5/</sup> We would point out that 5 U.S.C. § 555(b) provides, in relevant part, that "so far as the orderly conduct of public business permits, an interested person may appear before an agency or its responsible employees for the presentation, adjustment, or determination of an issue, request or controversy in a proceeding \* \* \*." (Emphasis supplied.)

