US. v. MICHAEL R. MARK ANTHONY

177 IBLA 110 Decided April 15, 2009

United States Department of the Interior
Office of Hearings and Appeals
Interior Board of Land Appeals
801 N. Quincy St., Suite 300
Arlington, VA 22203

UNITED STATES OF AMERICA
v.
MICHAEL R. MARK ANTHONY
(PAUL G. SHEARER, INTERVENOR)

IBLA 2008-184 Decided April 15, 2009

Appeal from an Administrative Law Judge's dismissal of a mining contest complaint challenging the validity of two lode mining claims within the Denali National Park and Preserve in Alaska on the basis of lack of a valuable discovery. AA-71472.

Motion for partial remand denied; extension of time to file answer granted.

1. Mining Claims: Patent--Mining Claims: Title

The Secretary's issuance of a First Half Mineral Entry Final Certificate constitutes the Secretary's acceptance of the chain of title submitted by a mining patent applicant to show his title to the mining claims that are the subject of the application.

2. Mining Claims: Patent--Mining Claims: Title

The Bureau of Land Management has no authority to determine that a patent applicant did not have title to the mining claim for which he seeks a patent contrary to the Secretary's acceptance of the applicant's chain of title.

APPEARANCES: Steven Scordino, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Anchorage, Alaska, for the Bureau of Land Management; Paul G. Shearer, Lake Oswego, Oregon, *pro se*.

OPINION BY ADMINISTRATIVE JUDGE HEATH

The National Park Service (NPS) has appealed the April 29, 2008, decision of Administrative Law Judge (ALJ) Harvey C. Sweitzer in a mining claim contest against mineral patent application AA-71422, a complaint filed by the Bureau of Land Management (BLM) on behalf of the NPS challenging the validity of the Banjo lode mining claim, FF-54240, and the Pass lode mining claim, FF-54241, located in the Kantishna Mining District in secs. 5 and 8, T. 16 S., R. 17 W., Fairbanks Meridian, within the Denali National Park and Preserve in Alaska. In his 170-page decision, Judge Sweitzer dismissed the Government's complaint, concluding that both claims contained a discovery of a valuable deposit when the subject lands were withdrawn from mineral entry on March 16, 1972, under Public Land Order No. 5179, 37 Fed. Reg. 5579, 5582.

BACKGROUND

A hearing in the matter was conducted in Anchorage, Alaska, on August 8-11, 2005, and June 12-14, 2006. The contest complaint had named Michael R. Mark Anthony as the contestee, but he did not participate in the hearing.[1] The complaint additionally identified Paul G. Shearer as an interested party.[2] Shearer participated in the hearing as an intervenor, submitting evidence in support of the subject claims' validity. He also filed post-hearing briefs in opposition to the Government's position. It appears that his participation provided the rationale and evidence upon which Judge Sweitzer based his ruling against the Government's *prima facie* showing that the claims were not valid when the subject lands were withdrawn from mineral entry.

Following several extensions of time, a Statement of Reasons (SOR) was filed on October 31, 2008. On November 28, 2008, Shearer requested an extension of time until April 30, 2009, in which to file an answer. On March 22, 2009, Shearer filed a second request for an extension of time (to June 1, 2009). Shearer's motions for extension of time will be addressed below.

In the meantime, on November 3, 2008, just after the SOR was filed, BLM filed a "Motion for Partial Remand" asking the Board "to partially remand this case so that BLM has the jurisdiction to adjudicate" a protest against the mineral application. Motion at unpaginated 2. The "Protest against Issuance of Mineral Patent Application" (Protest) was signed by an attorney in the Regional Solicitor's Office

[1] "Mark Anthony" (not "Anthony") is the contestee's surname.
[2] Shearer apparently obtained his interest in the claims in a settlement agreement resolving four cases in the Alaska State courts. *See* ALJ Decision at 2.

acting as counsel for NPS on August 1, 2008, and filed with the BLM Alaska State Office, citing the rules governing protests against mineral patent applications at 43 C.F.R. § 3872.1.[3] BLM asserts:

> The protest itself could prove dispositive on the issue of validity. The gist of the protest is that Michael Mark Anthony did not own the Banjo and Pass claims due to the expiration of the option agreement that had allowed the Red Top Mining Company to work the claims. The protest claims the option agreement expired on November 24, 1979, and therefore Michael Mark Anthony, who allegedly gained his interest[] from the Red Top Mining Company, did not have full possessory legal title to support his mineral patent. Further, Michael Mark Anthony would have been a trespasser on the claims when he made the annual filings under section 314 of the Federal Land Policy and Management Act of 1976 ("FLPMA"), 43 U.S.C. § 1744. The claim is considered abandoned and the claims cease to exist when the actual owner does not make the FLPMA filings. *United States v. Locke*, 471 U.S. 84, 98 (1985). Therefore, the Banjo and Pass claims may also be found invalid based on abandonment.

Motion at 2. As expressed in the Protest:

> Since Red Top Mining Company and the Applicant predicated their asserted possessory title on the 1937 option, the expiration of such option removed their authority to maintain possession of the contested mining claims, and their possession thereafter constituted a continuing trespass as against the true owners of the claims. Since these *true owners* (whoever they may be) or someone in privity with them subsequent to November 4, 1979, failed to make any of the filings and fee payments required by section 314 of FLPMA (43 U.S.C. § 1744), the Interior Department and Related Agencies Appropriations Act of 1993 (106 Stat. 1378-1379), and Sections 10101-10106 of the Omnibus Budget Reconciliation Act (28 U.S.C. § 28i, *et seq*.), the contested claims were forfeited and the land covered by them came completely under the jurisdiction of the National Park Service.

Protest at 2 (emphasis added). BLM does not allege that it did not receive mining claim maintenance filings and fee payments required under the applicable statutory

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[3] *See* Intervenor's Opposition to Contestant's Motion for Partial Remand (Opposition) Ex. C. For unexplained reasons, BLM's Motion describes the Protest as "received" on May 25, 2008. Motion at 1.

provisions.[4] It argues that those filings and payments were made by a trespasser or trespassers rather than by the true owners, and that the claims therefore were forfeited by operation of law.

In addition to asserting that BLM lacks jurisdiction because this appeal is pending before the Board, Shearer contends that BLM already attempted to bring this issue before the ALJ by motion dated May 25, 2006 (between the first and second phases of the hearing), and that the ALJ rejected that motion as untimely and lacking merit. Opposition at 2, 7-8, and Exs. A and B. Shearer also argues that neither BLM nor this Board has jurisdiction to review title issues relating to the subject mining claims because a First Half Mineral Entry Final Certificate (FHFC) has been approved by the Secretary and, therefore, only the Secretary can vacate the FHFC on the basis of title deficiencies. *Id*. at 2, 8-11. Mark Anthony filed patent application AA-71472 on July 19, 1989. Secretary Bruce Babbitt signed the FHFC on January 5, 1995. Hearing Exs. M-1 and 11. Shearer further asserts that the U.S. District Court for the District of Alaska, where just compensation proceedings under section 120 of the Act of November 14, 1997, Pub. L. No. 105-83, 111 Stat. 1543, 1564-66, are pending for these claims,[5] possesses exclusive jurisdiction over title matters in this case and authority for IBLA and BLM to review title concerns has not been granted by the court. Opposition at 2, 11-12.

BLM argues that Judge Sweitzer's rationale for not allowing the contest complaint to be amended was that it was untimely because the hearing had already started and was in a hiatus. Reply to Opposition to Motion for Partial Remand (Reply) at unpaginated 2. Thus, BLM maintains, the ALJ's ruling did not constitute a decision regarding title or patentability. BLM further disputes Shearer's contention that the FHFC signifies the Department has fully adjudicated whether Mark Anthony had good title to the Banjo and Pass claims. *Id*. at unpaginated 3-4. BLM also asserts that the U.S. District Court does not have exclusive jurisdiction over issues regarding title. *Id*. at unpaginated 4-5.

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[4] *See* 43 U.S.C. § 1744 (2000); Pub. L. No. 102-381, Title I, 106 Stat. 1378-79 (1992); 30 U.S.C. §§ 28f-28k (2006).

[5] *Shearer v. United States*, Civil No. A03-0263-CV (JKS) (D. Alaska). The District Court has stayed that action pending the Department's determination as to the validity of the claims. *See* ALJ Decision at 2.

ANALYSIS

I. The FHFC Constituted Acceptance of the Applicant's Chain of Title to the Claim.

[1] BLM regulations at 43 C.F.R. § 3862.1-3 governing lode mining claim patent applications provide in relevant part:

> (a) Each patent application must be supported by either a certificate of title or an abstract of title certified to by the legal custodian of the records of locations and transfers of mining claims or by an abstracter of titles. . . .
>
> . . . .
>
> (d) A certificate to an abstract of title must state that the abstract is a full, true, and complete abstract of the location certificates or notices, and all amendments thereof, and of all deeds, instruments, or actions appearing of record purporting to convey or to affect the title to each claim.
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> (e) The application for patent will be received and filed if the certificate of title or an abstract is brought down to a day reasonably near the date of the presentation of the application *and shows full title in the applicant*, who must as soon as practicable thereafter file a supplemental certificate of title or an abstract brought down so as to include the date of the filing of the application. (Emphasis added.)

In short, a patent applicant must show title to the claim for which he seeks a patent. In applying this rule, BLM requires examination of the title documentation as follows:

> In conformance with 43 CFR 3862.1-3(c) and (d), the chain of title must contain the required certified documents (location certificate, amendments, and conveyances) necessary to show complete chain-of-title to the mining claim or mill site. . . . The title documents must be compared to the material in the Bureau's mining claim recordation files to ensure that nothing is overlooked or omitted by the applicant.

BLM Manual (Rel. 3-266, July 9, 1991), § 3860.06.E.[6] The *BLM Handbook* further clarifies:

[6] Section 3860.06.F further states: "If the chain of title is complete to the satisfaction of the adjudicator, referral to the Solicitor for a title opinion is not necessary."

> The mining claim recordation files for the claims under patent application should be thoroughly reviewed in order to verify that no discrepancies exist between the title evidence submitted with the application and the record title evidence filed pursuant to the recordation requirements of Section 314 of FLPMA. . . . The minimum filing requirements of the Act must be met.

BLM Handbook H-3860-1, "Processing Mineral Patent Applications," III.D.6 (Evidence of Title: Mining Claim Recordation).

The BLM authorized officer prepares the FHFC at the conclusion of the review process and after publication of notice of the application, receipt of the publisher's affidavit, receipt of final proof of compliance with the Mining Law, and payment of the purchase price. *See BLM Manual*, §§ 3860.06.H and 3860 *Glossary* at 4 ("final certificate"). On March 2, 1993, authority to issue FHFCs and patents was withdrawn from BLM and subordinate officials and reserved to the Secretary. *See* Secretarial Order 3163 (Mar. 2, 1993), and subsequent amendments dated Dec. 16, 1993, Dec. 23, 1994, and Dec. 18, 1995. Under the Secretarial Orders, BLM would continue to receive mineral patent applications, but only the Secretary could issue FHFCs and grant mineral patents.[7]

The FHFC creates equitable title in the patent applicant. *Mouat Nickel Mines, Inc.*, 165 IBLA 305, 311 (2005); *Silver Crystal Mines, Inc.*, 147 IBLA 146, 149 (1999). The vesting of equitable title and the presumption of a right to patent is subject to verification of a valid discovery. As we have explained:

> The FHFC informs the applicant that a patent may issue if all is found regular and upon demonstration and verification of a discovery of a valuable mineral deposit, subject to the reservations, exceptions, and restrictions noted in the patent. (Solicitor's Opinion, Nov. 12, 1997 M-36990 at 3.) After the Secretary signs the FHFC, the patent application is returned to BLM for preparation of a mineral report by a BLM examiner in order to verify discovery.

United States v. Garcia, 161 IBLA 235, 238 (2004).

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[7] In April 2001, after the time period relevant to this case, the Secretary delegated authority to the Assistant Secretary for Land and Minerals Management to sign Mineral Entry Final Certificates and mineral patents, with authority to redelegate that authority only to the BLM Director. Secretarial Order 3228, dated Apr. 10, 2001; 209 DM 7.1.E. The Assistant Secretary redelegated that authority to the BLM Director. 235 DM 1.1.R.

It is clear from the express requirements regarding documentation of title and BLM's review process discussed above that BLM does not simply accept the title documents for filing and prepare the FHFC without reviewing them. Where the FHFC has issued, the applicant's title to a mining claim is presumed based on BLM's examination of the certificate of title or abstract of title and related documents showing a chain of title to the applicant. In the instant case, Mark Anthony submitted an abstract of title prepared by counsel on March 31, 1993. Opposition at 3. According to Shearer, the abstract also included an order from the Fourth Judicial District of the Alaska Superior Court quieting title in Mark Anthony as to the Banjo and Pass claims. *Id*. BLM does not dispute this.

As noted, the Secretary issued the FHFC for the Banjo and Pass claims on January 5, 1995. In issuing the FHFC, the Secretary in effect ruled that the proof regarding the legal status of the subject mining claims, including the chain of title, was proper and in order. Thus, the Secretary's issuance of the FHFC necessarily constituted the Secretary's acceptance of the applicant's chain of title.

II. The Secretary's Issuance of the FHFC Bars BLM from Determining that Mark Anthony Did Not Have Title to the Claims.

[2] The Secretary has continuing jurisdiction over the public lands until a patent issues, and possesses the authority to correct or reverse an erroneous decision of his subordinates or predecessors. *See*, *e.g.*, *Ideal Basic Industries v. Morton*, 542 F.2d 1364, 1367-68 (9th Cir. 1976), and cases cited. BLM, however, is a delegate of, and subordinate to, the Secretary. 43 U.S.C. § 1731(b) and (c); 209 DM 7.2; 235 DM 1.1. A decision by the Secretary binds both subordinate BLM officials and this Board. This principle is reflected in the regulations governing appeals to the Board. Under 43 C.F.R. § 4.410(a)(3), a party adversely affected by a decision of a BLM officer has a right to appeal to the Board except "[w]here a decision has been approved by the Secretary." As we held in *Mouat Nickel Mines, Inc.*:

> It is well established that this Board has no jurisdiction to review a decision of BLM which has been approved by the Secretary of the Interior. 43 CFR 4.410(a)(3); *see Blue Star, Inc.*, 41 IBLA 333, 335-36 (1979) (The Board lacks jurisdiction to review a decision issued or approved by an Assistant Secretary prior to the filing of any appeal because the Assistant Secretary exercises the full authority of the Secretary on matters within his delegated authority.) The corollary of this principle is that when the Secretary of the Interior, the chief executive officer of the Department, has ruled on the issues presented in an appeal to this Board, the review authority of the Board is limited to determining whether the Secretary's decision has been properly applied and implemented. [Citations omitted.] While the continuing

> authority of the Secretary to correct or reverse an erroneous decision of his subordinates or predecessors as long as patent has not issued is widely recognized, *e.g.*, *Ideal Basic Industries v. Morton*, 542 F.2d 1364, 1367-68 (9th Cir. 1976), we know of no authority for BLM adjudicators to overrule the decision of the Secretary.

165 IBLA at 312. Although that case concerned compliance with other administrative requirements of the mining law and not the claimant's title, the same principle applies here. BLM has no authority to determine that Mark Anthony did not have title to the subject claims contrary to Secretary Babbitt's acceptance of Mark Anthony's chain of title. Only the Secretary may make such a determination.[8]

For all of these reasons, BLM's Motion for Partial Remand is without basis.

As stated previously, Shearer has requested two extensions of time in which to file an answer, first to April 30, 2009, and then to June 1, 2009. Shearer states that he "is pro-se and proceeding without a lawyer," Second Request for Extension of Time at 2, but then states that he hired a lawyer to review the arguments in BLM's SOR and received "a first memo of legal advice" from the lawyer in the week preceding his March 22 second request. *Id*. While BLM had approximately 6 months to prepare its SOR, Shearer has now had almost 5 months to prepare his answer. In view of the additional time necessitated by BLM's Motion for Partial Remand and some of the other factors Shearer asserts, we grant Shearer an extension until May 15, 2009, to file his answer.

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[8] BLM relies on the last sentence in the FHFC: "Therefore: Patent may issue *if all is found regular* and upon demonstration and verification of a discovery of a valuable mineral deposit . . . ." Reply at unpaginated 3, *quoting* FHFC (emphasis BLM's). BLM interprets the phrase "if all is found regular" as an authorization for it to re-examine Mark Anthony's title. We need not here decide the scope of that phrase in situations where the Secretary has not acted on the question; it does not provide an exception to the principle that the Secretary's acceptance of the applicant's chain of title binds BLM.

CONCLUSION

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Motion for Partial Remand is denied. In addition, Shearer is granted an extension of time until May 15, 2009, in which to file an answer.

/s/
Geoffrey Heath
Administrative Judge

I concur:

/s/
Christina S. Kalavritinos
Administrative Judge