



CAREY MILLS v. KURT KANAM

188 IBLA 46

Decided June 23, 2016



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

703-235-3750

703-235-8349 (fax)

CAREY MILLS v. KURT KANAM

IBLA 2016-117

Decided June 23, 2016

Interlocutory appeal from two orders of Administrative Law Judge Harvey C. Sweitzer, denying motions to dismiss a private mining contest. Contest No. AKFF 096515.

Affirmed.

1. Administrative Procedure: Administrative Review;
Mining Claims: Contests;
Mining Claims: Determination of Validity;
Mining Claims: Possessory Right;
Office of Hearings and Appeals;
Rules of Practice: Private Contests.

The Office of Hearings and Appeals has jurisdiction to adjudicate a private mining contest where the matter at issue is not the right of possession as between adverse mining claimants of the same area of Federal lands, but rather the validity of the contestee's unpatented mining claims as they burden the Federal lands.

2. Administrative Procedure: Administrative Review;
Mining Claims: Contests;
Mining Claims: Determination of Validity;
Mining Claims: Possessory Right;
Office of Hearings and Appeals;
Rules of Practice: Private Contests.

A person has the right to bring a private mining contest, pursuant to 43 C.F.R. § 4.450-1, based on claiming an interest in a Federal mining claim adverse to that of the mining claimant where he asserts a right of access across the claim to his neighboring State mining claim, along an alleged R.S. 2477 right-of-way.

APPEARANCES: Carey Mills, San Antonio, Texas, *pro se*; Kurt Kanam, Olympia, Washington, *pro se*.

OPINION BY ADMINISTRATIVE JUDGE RIECHEL

Kurt Kanam pursues an interlocutory appeal from two orders of Administrative Law Judge Harvey C. Sweitzer denying Mr. Kanam's motions to dismiss a private mining contest brought by Carey Mills. In his motions to dismiss, Mr. Kanam challenged the Department of the Interior's jurisdiction over the dispute and Mr. Mills's standing to bring a private mining contest. By orders dated November 10, 2015, and March 3, 2016, Judge Sweitzer denied the motions, concluding both that the Department has jurisdiction over the private mining contest and that Mr. Mills has standing as a contestant.

We agree with Judge Sweitzer that the Department has jurisdiction over the private mining contest because Mr. Mills challenges the validity of Mr. Kanam's mining claims and does not seek to establish a right of possession as between adverse mining claimants of the same area of Federal lands. We also agree that Mr. Mills has an interest in land adverse to Mr. Kanam's mining claims sufficient to establish standing to bring a private mining contest under the Department's regulations. We therefore affirm Judge Sweitzer's orders.

The Mining Contest

Contestant Mr. Mills holds mining claims on Alaska State lands near Eagle, Alaska.¹ To access those claims with mining equipment, he must cross Mr. Kanam's Federal unpatented mining claims, but Mr. Kanam will not allow Mr. Mills to do so.² Mr. Mills has been seeking legal access across Mr. Kanam's claims through administrative and Federal court proceedings since at least 2010.³

¹ Complaint ¶¶ 1, 7 (Oct. 29, 2012) (referencing State of Alaska Mining Claims ADL 611494-611496, 611578-611581); *see also* State Mining Location Notices/Certificates, Attachment A to Scott Wood (previous owner of Mr. Kanam's mining claims) Notice of Disqualification/Motion to Dismiss (filed May 19, 2014).

² Order by ALJ Sweitzer at 1 (Oct. 24, 2013); Mills's Memorandum in support of Motion for Summary Judgment at unpaginated 2 (filed Apr. 22, 2013); *see also* ALJ Sweitzer's Order (June 3, 2014) (identifying Mr. Kanam's unpatented mining claims as AKFF 040559 – 040567); Mr. Kanam's Notice of Appearance, Attachment (filed Aug. 18, 2014) (quit claim deed transferring claims to Mr. Kanam).

³ Order by ALJ Sweitzer at 1 (Oct. 24, 2013).

On October 29, 2012, Mr. Mills filed with BLM a private mining contest complaint, principally challenging the validity of Mr. Kanam's unpatented mining claims. Mr. Mills specifically asserted that (1) BLM improperly determined that the claims were lawfully located on Federal lands not reserved for public use and/or before the July 23, 1955, enactment of the Surface Resources Act;⁴ (2) the claims were invalid in the absence of a discovery of a valuable mineral deposit, which, although it may have been in existence at the time of location, has been exhausted; and (3) the claims are, to the extent they intersect Mr. Mills' State mining claims, subject, under 30 U.S.C. § 41 (2012), to rights-of-way that allow Mr. Mills to conveniently work his claims.⁵

The BLM referred the complaint to the Department's Office of Hearings and Appeals (OHA), and the contest was assigned to Judge Sweitzer in the Departmental Cases Hearings Division for a hearing and decision on the record.

Mr. Kanam's Motions to Dismiss and Interlocutory Appeal

In a response to a motion for summary judgment filed by Mr. Mills in 2015, Mr. Kanam filed a document that was effectively a motion to dismiss for lack of standing. The filing was a copy of a complaint Mr. Kanam apparently prepared for the United States District Court for the District of Alaska (although it is not clear that he actually filed it in court), seeking, among other things, "a declaratory ruling ... that Mills lacks standing to maintain a private mining contest."⁶ The basis for Mr. Kanam's position that Mr. Mills lacks standing was that Mr. Mills has "no actual legally recognized interest in the area bounded by [Mr. Kanam's claims]."⁷

By order dated November 10, 2015, Judge Sweitzer disagreed with Mr. Kanam, in effect denying the motion to dismiss, concluding that Mr. Mills has a right to bring the private contest under 43 C.F.R. § 4.450-1.⁸ Judge Sweitzer explained that Mr. Mills has an "an interest in land adverse" to Mr. Kanam's mining claims, which is all that is required to bring a private contest to invalidate Mr. Kanam's claims under 43 C.F.R. § 4.450-1:

⁴ See 30 U.S.C. § 612 (2012)

⁵ Complaint ¶¶ 4-6.

⁶ Plaintiff Kanam's Original Complaint ¶ 6.3 (submitted to OHA Nov. 3, 2015).

⁷ *Id.* ¶ 4.6.

⁸ Order at 4 (Nov. 10, 2015).

[Mr. Mills's] adverse interest in [Mr. Kanam's] unpatented federal mining claims stems from at least two separate circumstances. First, [Mr. Kanam] is denying [Mr. Mills] the ability to access his State of Alaska mining claims with mining equipment by prohibiting [Mr. Mills] from crossing over [Mr. Kanam's] federal claims with that equipment. Access to [Mr. Mills's] claims across [Mr. Kanam's] claims has been deemed 'the only reasonable physical access.' Second, [Mr. Mills] claims an RS 2477 right of way through [Mr. Kanam's] mining claims which, in the State of Alaska, is self-executing and may be asserted by a private individual. Thus, [Mr. Mills] has an adverse interest in [Mr. Kanam's] claims for purposes of section 4.450-1.^[9]

On February 24, 2016, Mr. Kanam filed another motion to dismiss the private mining contest, asserting that the basis for the contest is a dispute between rival mining claimants—Mr. Mills and Mr. Kanam—about the right to possession of mining claims, over which the Department has no jurisdiction.¹⁰ Mr. Kanam contended that Mr. Mills's "true motive in this case is to use this forum to perpetrate what is essentially litigious claim jumping, as he as a rival mining claimant cannot seriously believe there are no valuable minerals on the property he has filed claims upon."¹¹ Mr. Kanam also asked that, if the judge denies dismissal, he certify the action for interlocutory appeal to this Board.¹²

Judge Sweitzer denied the motion to dismiss.¹³ In his March 3, 2016, order, Judge Sweitzer rejected Mr. Kanam's assertion that the matter at issue was the right of possession of mining claims; instead, the judge stated that the "sole issue" was the "validity of [Mr. Kanam's] mining claims," that is, whether the claims are "null and void for the lack of discovery of any valuable mineral deposit within [the claim] boundaries."¹⁴ Furthermore, Judge Sweitzer determined that jurisdiction is a controlling question of law, the resolution of which will materially advance the final

⁹ *Id.* (citations omitted).

¹⁰ Contestee-Defendant Kanam's Motion to Dismiss or to Certify Appeal at 2 (filed Feb. 24, 2016).

¹¹ *Id.*

¹² *Id.* at 1, 2.

¹³ Order (Mar. 3, 2016).

¹⁴ *Id.* at 1, 1 n.1.

decision, so he certified his November 10, 2015, order and his March 3, 2016, order for appeal to the Board.¹⁵

We granted the petition for interlocutory appeal under 43 C.F.R. § 4.28, construing the request Mr. Kanam included in his motion to dismiss as a joint request for the administrative law judge's certification and the Board's permission to proceed with an interlocutory appeal.¹⁶ In his notice of appeal, Mr. Kanam asks the Board to dismiss the private mining contest for lack of jurisdiction, "due to the lack [of] [Mr. Mills's] standing or any valid basis for a private mining contest" and the fact that Mr. Mills's status as an adverse claimant "requir[es] his issues to be addressed in the [F]ederal District Court."¹⁷

The Department Has Jurisdiction Over Mr. Mills's Private Mining Contest

[1] In his statement of reasons, Mr. Kanam repeatedly asserts that the private contest is, in reality, an improper effort by Mr. Mills to establish, in an administrative forum, superior possessory rights as between two rival mining claimants.¹⁸ As Mr. Kanam correctly notes, competing claims of ownership of mining claims must be resolved by a court of competent jurisdiction.¹⁹ Neither BLM nor the Department has authority to resolve disputes among rival mining claimants about the possession of mining claims.²⁰

Nevertheless, we agree with Judge Sweitzer that what is presently at issue in this case is *not* the right of possession between adverse mining claimants but the fundamental validity of Mr. Kanam's Federal unpatented mining claims. In the complaint Mr. Mills filed with OHA, none of his claims asserts a right to possess Mr. Kanam's mining claims. Instead, Mr. Mills specifically states that he is bringing "a private mining claim contest charging that [Mr. Kanam's] Federal unpatented mining claims are invalid, void of any valuable mineral deposit that may have been discovered and have 'lost' the legitimate distinction as valid mining claims due to the

¹⁵ *Id.* at 2; *see also* Memorandum to the Board from Judge Sweitzer at 1 (Mar. 9, 2016).

¹⁶ Order at 2 (Mar. 23, 2016).

¹⁷ Notice of Appeal at 1.

¹⁸ Statement of Reasons (SOR) at 1-5.

¹⁹ *Id.* at 3, 4-5; *see also* 30 U.S.C. § 30 (in the context of adverse claims in patent proceedings, "a court of competent jurisdiction ... determine[s] the question of the right of possession"); *Recon Mining Company, Inc.*, 167 IBLA 103, 109 (2005).

²⁰ *Recon Mining Company, Inc.*, 167 IBLA at 109.

exhaustion of the valuable mineral deposit.”²¹ Mr. Mills denies claiming any possessory rights to Mr. Kanam’s Federal mining claims.²² As Mr. Mills notes in his Answer before the Board, his State mining claims expressly exclude the land encompassed by Mr. Kanam’s Federal mining claims.²³

Furthermore, Mr. Mills explains that his private mining contest follows directly from an order of the United States District Court for the District of Alaska dismissing Mr. Mills’s action against Mr. Kanam’s predecessor-in-interest challenging the validity of the claims.²⁴ The District Court observed that “it does not appear that [Mr. Mills] has properly initiated a private contest or protest under applicable DOI Regulations. See 43 C.F.R. §§ 4.450-1, et seq.”²⁵ Mr. Mills filed his private mining contest about five months after the District Court’s order, a fact which supports the position that Mr. Mills intends to challenge the validity of the claims, not a right to possess the claims.

Until the Government issues a patent, the validity of a Federal mining claim may be challenged by a Government contest under 43 C.F.R. § 4.451-1 or a private contest under 43 C.F.R. § 4.450-3, so that the Department, acting through the Secretary of the Interior, may ensure that “valid claims may be recognized, invalid ones eliminated, and the rights of the public preserved.”²⁶ The jurisdiction to adjudicate the validity of a Federal mining claim fundamentally resides in the Department.²⁷ Because the Department has jurisdiction over Mr. Mills’s private mining contest, we affirm Judge Sweitzer’s March 3, 2016, order.

²¹ Complaint at 2, ¶ 5; *see also id.* at 8, ¶¶ 41-63 (second claim) (dated Oct. 24, 2012).

²² Answer at 5.

²³ *Id.*; State Mining Location Notices/Certificates, Attachment A to Scott Wood Notice of Disqualification/Motion to Dismiss (filed May 19, 2014).

²⁴ Answer at 5; *see also* Complaint at 1, ¶ 3 (“This complaint is initiated ... as a direct result of the Federal District[] Court’s determination ...”).

²⁵ *Mills v. United States et al.*, Case No. 4:10-cv-00033-RRB, Order re: Motions at Dockets 155, 156, and 160 at 32 n.66 (June 8, 2012, D. Alaska).

²⁶ *Cameron v. United States*, 252 U.S. 450, 460 (1920).

²⁷ *See Best v. Humboldt Placer Mining Co.*, 371 U.S. 334, 336 (1963) (“The determination of the validity of claims against the public lands was entrusted to the General Land-Office in 1812 ... and transferred to the Department of the Interior on its creation in 1849.”); *United States v. Bagwell*, 961 F.2d 1450, 1453-54 (9th Cir. 1992) (“[W]ith regard to claims where the claimant has not taken possession of the

(continued...)

Mr. Mills Has Standing to Bring a Private Mining Contest

[2] We also agree with Judge Sweitzer that Mr. Mills has standing under 43 C.F.R. § 4.450-1 to bring the private contest because he is claiming an interest in the land encompassed by Mr. Kanam's Federal mining claims, and his interest is adverse to Mr. Kanam's. The regulation at 43 C.F.R. § 4.450-1 provides, in relevant part, that

[a]ny 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.

To establish standing under 43 C.F.R. § 4.450-1, the Board has required contestants to show that their claim to an "interest in land" is "grounded on a specific statutory grant."²⁸

Mr. Mills asserts an interest in the lands at issue by virtue of his claim of a right to access his State mining claims adjacent to Mr. Kanam's Federal mining claims by way of the Fortymile Trail, a Revised Statute (R.S.) 2477 right-of-way that runs across Mr. Kanam's Federal mining claims. R.S. 2477 refers to section 8 of the Act of July 26, 1866, which granted states and localities rights-of-way "for the construction of highways over public lands, not reserved for public uses."²⁹ R.S. 2477 was repealed by the Federal Land Policy and Management Act of 1976, but valid existing rights established before then were preserved.³⁰

(...continued)

land, the Department of the Interior has primary jurisdiction to determine the validity of mining claims on public lands.").

²⁸ *In Re Pacific Coast Molybdenum Co.*, 68 IBLA 325, 334 (1982) (quoting *United States v. United States Pumice Co.*, 37 IBLA 153, 159, n.4 (1978)).

²⁹ Act of July 26, 1866, ch. 262, § 8, 14 Stat. 251, 253, *codified at* 43 U.S.C. § 932, *repealed by* Federal Land Policy and Management Act of 1976 (FLPMA), Pub. L. No. 94-579 § 706(a), 90 Stat. 2743, 2793 (1976).

³⁰ *Id.*; *see also* FLPMA, Pub. L. No. 94-579 § 701(a), 90 Stat. at 2786; 43 U.S.C. § 1701 note (2006) (Savings provision).

In determining whether Mr. Mills’s claim of a right to use an asserted R.S. 2477 right-of-way across Mr. Kanam’s unpatented mining claims is an interest in lands sufficient to demonstrate standing under 43 C.F.R. § 4.450-1, we consider whether an R.S. 2477 right-of-way held not by Mr. Mills, but by the State of Alaska, can be the basis for Mr. Mills’s interest. On these same facts, the Ninth Circuit Court of Appeals held that landowners, like Mr. Mills, who seek access to their own property through an asserted R.S. 2477 right-of-way “have a sufficiently individualized and personal interest” to warrant a finding of prudential standing to bring suit.³¹ Although standing under the Board’s regulations does not rest on the principles of prudential standing established by Federal courts, we find the Ninth Circuit’s rationale persuasive. We therefore find that Mr. Mills’s claim of a right to use an asserted R.S. 2477 right-of-way across Mr. Kanam’s unpatented mining claims so that he can access his State mining claims is an assertion of an interest in land, grounded on a specific statutory grant, adverse to Mr. Kanam’s interests.

Fundamentally, in the present case, “each of the parties is asserting a claim to the use of the surface” of lands encompassed by the Federal mining claims, whether as the claimant (Mr. Kanam) or as a member of the public utilizing a purported R.S. 2477 right-of-way across the mining claims to access private property (Mr. Mills).³² Given the adverse nature of the two claims of interests in the lands, we hold that Mr. Mills’s interest is sufficient to afford him the right to bring the private contest challenging the validity of Mr. Kanam’s mining claims pursuant to 43 C.F.R. § 4.450-1.

According Mr. Mills standing under 43 C.F.R. § 4.450-1 is consistent with the purpose of private mining contests:

[I]f the purpose and end result of a private contest operates to protect the Government against invalid claims of title to or interest in public lands, then it is only reasonable that the public interest is served by allowing anyone with sufficient nexus, i.e., a possible conflicting or adverse interest such as surface owner or permittee[,] to bring to the attention of the Government, through a private contest, the possibility of an invalid claim of title or interest in public land. . . . If the Government through the Bureau of Land Management . . . can institute

³¹ *Mills v. United States*, 742 F.3d 400, 407-08 (9th Cir. 2014).

³² *Continental Oil Co. v. Aztec Exploration and Development Co.*, 32 IBLA 1, 3 (1977); see also *Mills v. Wood*, 2016 U.S. Dist. LEXIS 19230 at *8 (D. Alaska Feb. 17, 2016) (“Mills has the rights as a member of the general public to access the FortymileTrail.”).

a proceeding . . . to invalidate mining claims, then certainly a private party with *any interest* in land *which might reasonably be affected* by the mining claim or any activity incident thereto or stemming therefrom[] *should have standing* to institute a private contest to put the Government on notice and to resolve the issue of the claimed invalidity of a mining claim.^{33]}

Because we find that Mr. Mills has standing to bring his private mining contest, we affirm Judge Sweitzer's November 10, 2015, order.

Conclusion

Judge Sweitzer did not err in holding that the Department has jurisdiction to entertain the private mining contest brought by Mr. Mills against Mr. Kanam, challenging the validity of Mr. Kanam's Federal unpatented mining claims, and that Mr. Mills has standing under 43 C.F.R. § 4.450-1 to bring the contest. We affirm Judge Sweitzer's November 10, 2015, and March 3, 2016, orders denying Mr. Kanam's motions to dismiss. We express no opinion on the question of the validity of Mr. Kanam's Federal mining claims, which is currently at issue before Judge Sweitzer.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior,³⁴ we affirm Judge Sweitzer's orders denying Mr. Kanam's motions to dismiss the private mining contest for lack of jurisdiction.

/s/

Silvia M. Riechel
Administrative Judge

I concur:

/s/

Christina S. Kalavritinos
Administrative Judge

³³ *Thomas v. Morton*, 408 F. Supp. 1361, 1370 (D. Ariz. 1976).

³⁴ 43 C.F.R. § 4.1.