

UNITED STATES
v.
LYNN H. GROOMS, ET AL.

IBLA 98-391

Decided November 19, 1998

Appeal from a decision of Administrative Law Judge James J. Heffernan granting a motion to dismiss filed by the Bureau of Land Management in two mining claim contests. WYW114919, WYW114923, and WYW114924.

Affirmed as modified.

1. Contests and Protests: Generally—Mining Claims: Contests—Rules of Practice: Government Contests

The regulation governing the filing of answers to mining claim contest complaints, 43 C.F.R. § 4.450-6, provides that an answer to a contest complaint must be filed within 30 days of receipt of the complaint. This Board has held that the regulation is mandatory and may not be waived.

2. Administrative Authority: Generally—Contests and Protests: Government Contests—Mining Claims: Contests—Regulations: Force and Effect as Law—Rules of Practice: Government Contests

While binding on BLM employees, the BLM Manual does not have the force and effect of law and is not binding on the Department or this Board. Therefore, when a BLM Manual provision is contrary to an applicable regulation, that provision will not be followed.

3. Board of Land Appeals—Estoppel

The Board of Land Appeals has held that oral statements by BLM are insufficient to support a claim of estoppel and that erroneous advice must be in the form of a crucial misstatement in an official decision.

APPEARANCES: Timothy C. Kingston, Esq., Cheyenne, Wyoming, for appellant; Lyle K. Rising, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Lakewood, Colorado, for the Bureau of Land Management.

OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

On January 30, 1998, the Wyoming State Office, Bureau of Land Management (BLM), issued mining claim contest complaints (WYW114919, WYW114923, and WYW114924), charging, *inter alia*, lack of discovery of a valuable mineral deposit on various association placer mining claims located for bentonite clay in Park County, Wyoming. Those mining claims had been the subject of patent applications filed by the claimants for which mineral entry final certificates had been issued in August 1991. ^{1/}

The complaints each listed the names and addresses of eight claimants, and each complaint was accompanied by a notice stating: "Unless the contestee files an answer to the complaint in such office within thirty (30) days after service of this notice and complaint, the allegations of the complaint will be taken as admitted and the case will be decided without a hearing." Only three claimants were listed as contestees on both contest complaints—Lynn H. Grooms, Mark E. Thomas, and Gale Thomas.

On March 12, 1998, counsel for Mark E. Thomas filed with BLM an answer to the complaint designated as WYW114924. On March 13, 1998, counsel for Thomas filed an answer to the other contest complaint. On March 17, 1998, BLM transmitted the contest complaints and Thomas' answers to the Hearings Division, Office of Hearings and Appeals, U.S. Department of the Interior, in Salt Lake City, Utah. On the face of each transmittal, BLM noted that the answer had been "TIMELY FILED."

On April 17, 1998, counsel for BLM filed with Administrative Law Judge James H. Heffernan, the judge to whom the contests had been assigned, a "Motion to Dismiss for Lack of Jurisdiction," arguing that Thomas' answers were untimely. Counsel for Thomas filed a response to the Motion opposing dismissal. On June 12, 1998, Judge Heffernan granted BLM's Motion to Dismiss. Counsel for Thomas filed a timely appeal.

Judge Heffernan based his dismissal on the regulation at 43 C.F.R. § 4.450-6, which provides: "Within 30 days after service of the complaint

^{1/} One complaint contained the heading "Contest Number" and listed thereunder "WYW114919" and "WYW114923." It related to nine claims—the Eagle Mine Claim 5, the Eagle Mine Claim 6, the Golden Eagle Mine Claim 5, the Golden Eagle Mine Claim 6, the Golden Eagle #8, the Golden Eagle #9, the Golden Eagle Mine Claim #10, the Eagle Mine Claim #3, and the Golden Eagle Mine Claim #3. The text of that complaint, however, contained a reference to "Mineral Patent Applications WYW114919 and WYW114923." A second complaint contains the reference number WYW114924, identifying it as the contest number for the contest of five claims—the Big Buck Mine Claim #5, the Big Buck Mine Claim #6, the Cougar Mine Claim #1, the Cougar Mine Claim #2, and the Grizzly Mine Claim #1. It is not clear whether the reference numbers are those assigned to the mineral patent applications or the contests. In any event, there are three of those numbers, but only two contest complaints.

***, the contestee must file in the office where the contest is pending an answer specifically meeting and responding to the allegations of the complaint ***." 2/

The case record shows that Thomas received the two contest complaints on February 7, 1998. His counsel filed answers to those complaints on March 12, 1998 (WYW114924), and March 13, 1998 (WYW114919, WYW114923), more than 30 days after service of those complaints on Thomas.

On appeal, counsel for Thomas asserts that he contacted the BLM office in Cheyenne, Wyoming, on March 4, 1998, at which time he talked to Donna Kailey, a BLM land law examiner. In an affidavit, which accompanied his response to BLM's Motion to Dismiss, he states: "I told Ms. Kailey that I was then prepared to file the necessary Answers to the BLM's Contests but wanted to know exactly when those Answers were due. Ms. Kailey told me that Mr. Thomas' Answers were due on March 13, 1998." (Affidavit of Timothy C. Kingston, dated May 13, 1998, at 1-2.) "In reliance on Ms. Kailey's representation to me, I deferred filing Mr. Thomas' Answers on March 4, 1998 and filed them on March 12 and 13, 1998." Id. at 2. Although Kailey admits talking to counsel for Thomas on March 4, 1998, she disputes his contention that he was prepared to file the answers on March 4, 1998. "He definitely indicated to me that he was not prepared to do so. He specifically stated that he didn't know a lot about Mining Law, and was not sure what a Contest was and how to file an 'Answer' for a contest." (Affidavit of Donna Kailey, dated June 4, 1998, at 1.) She also stated that "he said he did not have a copy of the contests" and that she faxed him a copy of one of them. Id. Further, she asserts in that affidavit and in an affidavit dated May 13, 1998, that she told counsel for Thomas that answers were due to the contest complaints on or before close of business on March 12, 1998. She explained that she calculated that due date based on language in "the BLM's manual for Adverse Claims, Protests, Contests, and Appeals, Manual 3870-1, Chapter 4-14, paragraph 9," which, she stated, provides that "the date for a Contestee, in a Contest with multiple Contestees to file an Answer, is thirty days from the date the last Contestee is served with the BLM's Contest." (Affidavit of Donna Kailey, dated May 13, 1998, at 1-2.) Kailey stated that "the last contestee received their copy of the contest," on February 10, 1998. (Affidavit of Donna Kailey, dated June 4, 1998, at 1.)

Counsel for Thomas contends that the provision of the BLM Manual cited by Kailey is controlling, that Thomas' answers are timely, and, that even if they are untimely, BLM is estopped from arguing they are late based upon the actions of Kailey.

2/ The regulations in 43 C.F.R. § 4.450 relate to private contests and protests. However, in accordance with 43 C.F.R. § 4.451-2, proceedings in Government contests are governed by the same regulations, with certain exceptions, not applicable herein.

Counsel for BLM argues that the regulations are controlling, that the BLM Manual cannot amend the regulations, and that estoppel does not lie. He asserts that Judge Heffernan's decision should be affirmed.

The BLM Manual provision, cited by Kailey as the basis for her calculation of the due date for answers, provides:

9. Answer to Complaint.

a. Timely Filing. An Answer must be filed in the proper BLM office within thirty (30) days from the date of service of the complaint upon the contestee (See Illustration 13). (Note: If more than one contestee, the 30-day period would run from the date of the latest receipt of the complaint by one of the contestees.) If the complaint was published, the answer must be filed within thirty (30) days of the last date of publication.

Kailey believed, based on that provision, that answers to the complaint would be due on March 12, 1998, 30 days from Lynn H. Grooms' February 10, 1998, receipt of those complaints. ^{3/}

[1] The outcome of this appeal is governed by the regulation cited by counsel for BLM and relied on by Judge Heffernan. That regulation, 43 C.F.R. § 4.450-6, specifically requires that answers to contest complaints must be filed within 30 days of receipt of the complaint. This Board has held, on numerous occasions, that 43 C.F.R. § 4.450-6 is mandatory and may not be waived. E.g., Robert D. McGoldrick, 115 IBLA 242, 245 (1990); United States v. Evalt, 62 IBLA 116, 118 (1982); United States v. Soren, 47 IBLA 226, 227 (1980); United States v. Sainberg, 5 IBLA 270, 272-274 (1972), aff'd, Sainberg v. Morton, 363 F. Supp. 1259, 1263 (D. Ariz. 1973). When an answer is not timely filed, the allegations of the complaint will be taken as admitted, and BLM will decide the case without a hearing. 43 C.F.R. § 4.450-7.

BLM included with each contest complaint a notice informing the recipient of the necessity to file an answer within 30 days of service of the complaint. There is no question that under 43 C.F.R. § 4.450-6 the answers filed by counsel for Thomas on March 12 and March 13, 1998, were untimely. Thomas received the copies of the complaints on February 7, 1998. Therefore, his answers were due on or before March 9, 1998.

^{3/} BLM stated in its Motion to Dismiss that Grooms filed a "brief response on Mar. 16, 1998, asserting that the claims were valuable." (Motion at 2.) That answer was clearly untimely under 43 C.F.R. § 4.450-6 and is not part of the record of this appeal. There is no evidence in the case record that any other contestee filed an answer to either of the complaints.

[2] While binding on BLM employees, the BLM Manual does not have the force and effect of law and is not binding on the Department or this Board. See, e.g., Beard Oil Co., 111 IBLA 191, 194 (1989); Cities Service Oil and Gas Corp., 109 IBLA 322, 325 (1989); The Joyce Foundation, 102 IBLA 342, 345 (1988). When, as in this case, the BLM Manual provision is contrary to the applicable regulation, that provision will not be followed. Counsel for BLM speculates that the purpose of the italicized language in the BLM Manual section, quoted above, was to address

a situation involving representation of a group of contestees by one attorney—either an attorney-at-law or an attorney-in-fact, which is also not the case here. If, for example, lawyer John Doe represented 8 contestees and files one unified response on behalf of all contestees, he need only file one timely response and need not file eight, separate, timely responses.

(Answer at 5.)

Whether or not that was, in fact, the purpose, the provision is clearly contrary to the regulation. Moreover, if the 30-day period were to run, as the BLM Manual provisions states, from the "latest receipt of the complaint by a contestee," the dates in this case would have been beyond February 10, 1998, the date on which Lynn H. Grooms received the complaints.

As provided in 43 C.F.R. § 4.422(c)(3), "[a] document will be considered to have been served at the time of personal service, of delivery of a registered or certified letter, or of the return by the post office of an undelivered registered or certified letter." Furthermore, when a BLM officer uses the mail to send a communication to someone entitled to such communication, "that person will be deemed to have received the communication if it was delivered to his last address of record [with BLM] regardless of whether it was in fact received by him." 43 C.F.R. § 1810.2(b). In this case, some of the complaints sent to contestees' last addresses of record were returned to BLM by the U.S. Postal Service.

In WYW114924, copies of the complaint mailed to two of the contestees were returned to BLM on February 12, 1998, as undeliverable. Thus, under the regulations and the BLM Manual, the "latest receipt" of the complaint by a contestee in WYW114924 was February 12, 1998. For WYW114919 and WYW114923, copies of the complaint sent to four contestees were returned as undeliverable. They were returned to BLM on February 13, February 17, February 23, and February 25, 1998. Thus, February 25, 1998, was the date of "latest receipt" of a complaint in that contest.

[3] The fact that Kailey informed counsel for Thomas of an incorrect filing date, while unfortunate, does not constitute grounds for invoking estoppel. The Board has stated on a number of occasions that it will look to the elements of estoppel set forth in United States v. Georgia-Pacific Co., 421 F.2d 92, 96 (9th Cir. 1970), as the initial test in determining

estoppel questions presented to the Board. United States v. White, 118 IBLA 266, 303, 98 I.D. 129, 149 (1991). The four elements of estoppel set forth therein are (1) the party to be estopped must know the facts; (2) that party must intend that its conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended; (3) the party asserting estoppel must be ignorant of the facts; and (4) the party asserting estoppel must rely on the former's conduct to its injury.

In addition, we have adopted the rule of numerous courts that estoppel is an extraordinary remedy, especially as it relates to the public lands. Harold E. Woods, 61 IBLA 359, 361 (1982). Estoppel against the Government in matters concerning the public lands must be based on affirmative misconduct, such as misrepresentation or concealment of material facts. United States v. Ruby Co., 588 F.2d 697, 703 (9th Cir. 1978); D.F. Colson, 63 IBLA 221 (1982); Arpee Jones, 61 IBLA 149 (1982). However, we have expressly held that oral statements by BLM are insufficient to support a claim of estoppel and that the erroneous advice must be in the form of a crucial misstatement in an official decision. Martin Faley, 116 IBLA 398, 402 (1990), and cases cited therein.

In this case, counsel for Thomas cannot be said to have been ignorant of the true facts, i.e., the applicable regulation and the notice accompanying each contest complaint expressly stated that an answer had to be filed within 30 days of service of the complaint. In addition, the advice relied on was an oral communication, which we have held is not a sufficient basis to support a claim of estoppel.

Finally, "[r]eliance upon information or opinion of any officer, agent or employee or on records maintained by land offices cannot operate to vest any right not authorized by law." 43 C.F.R. § 1810.3(c).

Counsel for Thomas also requests that, if the Board considers the answers to be filed outside the 30-day period, the grace period of 43 C.F.R. § 4.422(a) be applied. That regulation provides that if a document, which is required to be filed within a certain time, is not received within that time, "the delay in filing will be waived if the document is filed not later than 10 days after it was required to be filed and it is determined that the document was transmitted or probably transmitted to the office in which the filing is required before the end of the period in which it was required to be filed." (Emphasis added.) In order for 43 C.F.R. § 4.422(a) to be applicable in this case, Thomas' answers would have had to have been transmitted to BLM "before the end of the period in which [they were] required to be filed," i.e., on or before March 9, 1998. They were not. Thomas' answers were hand-delivered to BLM on March 12 and March 13, 1998. Thus, the regulation cited by counsel is not applicable.

Alternatively, counsel for Thomas asserts that the circumstances of the case merit the granting of an extension of time to file answers, as

provided in 43 C.F.R. § 4.422(d), which allows the "Manager or the administrative law judge, as the case may be," to extend the time for filing or serving "any document in a contest." In Estate of Ralph James Steward & Anne M. Steward, 136 IBLA 275 (1996), this Board held that 43 C.F.R. § 4.422(d) could be applied to extend the time for filing an answer. However, in that case the request for an extension was timely filed within the 30-day time period for filing the answer, the request addressed with specificity the reasons for the request, and BLM never responded to the request. No request for extension was filed in this case during the 30-day period.

We agree with the legal analysis set forth in Judge Heffeman's decision. Nevertheless, we note that in the Motion to Dismiss filed by counsel for BLM, counsel requested that Judge Heffeman either "1) dismiss this contest for lack of jurisdiction, or 2) enter a decision pursuant to 43 CFR 4.450-7 taking the allegations of the contest complaints as admitted and declaring the claims invalid." (Motion to Dismiss at 4.) Judge Heffeman, however, did not distinguish between these alternative requests, he merely granted the Motion. To the extent that granting the Motion resulted in dismissal of the contests, we point out that mere dismissal of the contests does not affect the validity of the claims.

Therefore, while we hold that Judge Heffeman properly concluded that Thomas' answers were untimely, we modify his dismissal of the contests. In accordance with 43 C.F.R. § 4.450-7, the allegations of a contest may be taken as admitted, when the answer is untimely, and the case may be decided by BLM without a hearing. No useful purpose would be served, however, by remanding the case to BLM to take action under that regulation. Thus, we find the allegations of the complaints to be admitted, cancel the mineral entries, and declare the contested claims to be null and void.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decision appealed from is affirmed as modified by this opinion.

Bruce R. Harris
Deputy Chief Administrative Judge

I concur:

Gail M. Frazier
Administrative Judge

