

UNITED STATES
v.
NELSON E. DIVINE AND RAYMOND E. BRYANT

IBLA 70-120

May 10, 1971, Decided

Mining Claims: Contests – Rules of Practice: Government Contests

The regulations which provide that a contestee must file his answer to a contest complaint within 30 days of service, failing which the allegations of the complaint will be taken as admitted, and which require the manager to decide the case without a hearing are mandatory, and the Secretary is without authority to waive the rules to permit the late filing of an answer.

2 IBLA 258

IBLA 70-120	:	Sacramento Contest 078801
		:
UNITED STATES,		:
		:
Contestant,		:
		:
v.		:
		:
		:
NELSON E. DIVINE AND		:
RAYMOND E. BRYANT,		:
Contestees		:

Mining claim declared
null and void

Affirmed

DECISION

Nelson E. Divine and Raymond E. Bryant, claimants of the J & J placer mining claim located within the Shasta-Trinity National Forest in sec. 13, T. 7 N., R. 7 E., H.M., California, have appealed from a decision of the Office of Appeals and Hearings, Bureau of Land Management, which affirmed a decision of the Sacramento land office declaring the claim null and void.

Contest of the claim was initiated by the land office, pursuant to a recommendation by the Forest Service, on charges that a valid discovery of mineral was not disclosed within the limits of the claim and that the claim was occupied for purposes not related to mining. Bryant was served with a copy of the complaint on September 26, 1964, and Divine was similarly served on October 19, 1964. No answer to the complaint having been filed by either contestee within the 30-day period provided by regulations, the charges were taken as admitted, and by his decision of November 23, 1964, the land office manager held the claim to be null and void.

On appeal from this decision to the Director, Bureau of Land Management, the problem was compounded by the failure of the contestees to file a timely statement of reasons, resulting in dismissal of the appeal. The dismissal was affirmed by the Department in United States v. Nelson E. Divine and Raymond E. Bryant, A-30435 (April 28, 1965).

Subsequently, the United States District Court for the Eastern District of California remanded the case to the Department for an exercise of its discretion as to whether the administrative appeal should be dismissed or the late filing of the statement of reasons accepted. United States of America v. Raymond E. Bryant, Civil No. 9929 (D. Calif., filed September 10, 1969). The Department then returned the case to the Bureau of Land Management, where its Office of Appeals and Hearings vacated its decision of January 18, 1965, and rendered a decision on the merits. That decision, dated January 16, 1970, the decision here on appeal, concluded that even though the late filing of the statement of reasons for appeal was excused, the land office decision of November 23, 1964, was correct and it was thereby affirmed.

In their present appeal, contestees reiterate that the answer to the complaint was not filed within the prescribed period because Raymond E. Bryant understood that Nelson E. Divine had not been served, and because of confusion as to whether the answer was to be prepared and filed by a law firm or by one of its departing attorneys who had been contacted by Bryant for this purpose. It is argued that the Department has inherent or implied power to waive the regulation to permit the late filing of an answer, and that a rule precluding such relief in instances of excusable neglect is unconstitutional as a denial of due process of law.

The rules of practice of the Department governing contest procedures provide that, within 30 days after service of the complaint a contestee must file in the office where the contest is pending an answer specifically meeting and responding to the allegations of the complaint. 43 CFR 4.450-6, formerly 43 CFR 1852.1-6. 1/ The rules further provide that:

If an answer is not filed as required, the allegations of the complaint will be taken as admitted by the contestee and the manager will decide the case without a hearing. 43 CFR 4.450-7(a), formerly 43 CFR 1852.1-7(a) 2/

1/ Recodified 35 F.R. 7185, et seq., April 15, 1971.

2/ Id.

A warning to this effect is printed in italics at the bottom of the complaint served each of the appellants. These rules apply in Government contests. 43 CFR 4.451-2, formerly 43 CFR 1852.2-2. 3/

As noted in the decision below, the Department has consistently held that the requirements of these regulations pertaining to the timely filing of answers to contestant complaints are mandatory, and the Secretary is without authority to waive the rules to permit the late filing of an answer, since the Secretary is without authority to disregard the plain and unambiguous provisions of his own regulations. United States v. J. Hubert Smith, 67 I.D. 311 (1960); United States v. Owen O. Roberts, A-30825 (November 3, 1967); United States v. Sheldon E. Evans, A-30923 (September 30, 1968); United States v. Curtis E. Holcomb et al., A-31019 (August 21, 1969). This Board has held to the same effect. United States v. Willie Walker, 1 IBLA 29 (September 24, 1970); United States v. George Emsbarger, 1 IBLA 83 (October 29, 1970).

As further noted in the decision below, the case of United States v. J. Hubert Smith, *supra*, is almost directly in point, the failure to make timely answer in that case also having been due to the inadvertence and oversight of the appellant's attorney.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 13.5; 35 F.R. 12081), the decision of the Bureau of Land Management is affirmed.

Edward W. Stuebing, Member

We concur:

Joan B. Thompson, Member

Martin Ritvo, Member.

3/ Id.

