

Editor's note: Reconsideration denied by order dated Aug. 6, 1971

UNITED STATES OF AMERICA

v.

MERLE I. ZWEIFEL ET AL.

IBLA 70-532

Decided July 2, 1971

Rules of Practice: Appeals: Dismissal--Rules of Practice: Appeals: Standing to Appeal

An interlocutory decision rendered prior to the promulgation of the current rules of practice was not subject to appeal, and a purported appeal therefrom is dismissed as premature.

Rules of Practice: Appeals: Dismissal--Rules of Practice: Appeals: Standing to Appeal

Although the current regulation, 43 CFR 4.28 (36 F. R. 7189), permits interlocutory appeals in certain limited circumstances, the Board of Land Appeals will not grant permission thereunder for the filing of such an appeal unless it appears that disposition of such appeal may materially advance the final decision.

IBLA 70-532 :

Colorado Contest No. 441

UNITED STATES OF AMERICA,
Contestant

: Motions denied

v.

: Appeal dismissed

MERLE I. ZWEIFEL ET AL.,
Contestee

DECISION

The contestees in this mining contest have appealed to the Secretary of the Interior from a decision of the hearing examiner, dated May 13, 1970, denying their "Motion For Suspension Of Proceedings Or For Indefinite Continuance" and their "Motion For Order To Disqualify Any And All Employees, Agents, Servants, Hearing Examiners, Commissioners And Their Retinue."

The specific grounds asserted for the motions are embodied in the decision below, attached as Appendix A, which is incorporated herein by reference. Since the decision is not finally dispositive of the case, it is an interlocutory decision.

At the time these motions were filed there was no specific mention in the Department's rules of practice concerning appeals from interlocutory decisions. However, the Department ruled that an order of a hearing examiner denying a motion to postpone a hearing is not an appealable order and the movant has no right to appeal from the denial of his motion. United States v. Parkinson, 65 I.D. 282 (1958).

The Department also ruled that an interlocutory decision is not appealable prior to the rendering of a decision by the hearing examiner on the merits of the entire case, and an appeal from such an interlocutory decision is properly dismissed as premature. Newell A. Johnson et al., 70 I.D. 388 (1963). Under these rulings, the appeal would be dismissed.

Subsequent to the filing of the appeal, on April 15, 1971, the appellate regulations in 43 CFR were amended (36 F. R. 7185, 7189) to provide in part as follows:

§ 4.28 Interlocutory appeals.

There shall be no interlocutory appeal from a ruling of an examiner unless permission is first obtained from an Appeals Board and an examiner has certified the interlocutory ruling or abused his discretion in refusing a request to so certify. Permission will not be granted except upon a showing that the ruling complained of involves a controlling question of law and that an immediate appeal therefrom may materially advance the final decision. An interlocutory appeal shall not operate to suspend the hearing unless otherwise ordered by the Board.

This regulation was adopted after the denial of the motions by the examiner. Even if it is deemed to be applicable, it is our view that consideration of the merits of the interlocutory decision at this time would not "materially advance the final decision." 1/

Accordingly, the appeal from the decision of May 13, 1970, is dismissed without prejudice to the right of the contestees to address themselves to the substance of their motions at such time as the examiner rules on the merits of the case.

The case is remanded for appropriate action consistent with this decision.

Frederick Fishman, Member

We concur

Joan B. Thompson, Member

Newton Frishberg, Chairman

1/ The examiner has held hearings on the merits and has heard oral argument.

APPENDIX A

COPY

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
Office of Hearing Examiners
4209 Federal Building
Salt Lake City, Utah 84111

May 13, 1970

ORDER

UNITED STATES OF AMERICA,	:	COLORADO CONTEST NO. 441
Contestant	:	Involving the placer mining
v.	:	claims located in Moffat, Rio
	:	Blanco and Garfield Counties,
	:	Colorado.
MERLE I. ZWEIFEL, ET AL.,	:	
	:	
Contestees	:	

MOTION FOR SUSPENSION OF PROCEEDINGS
AND MOTION TO DISQUALIFY DENIED

By notice dated March 9, 1970, this matter was set for hearing to commence at 10 a.m. on June 2, 1970, in Room 2330 Federal Building, Denver, Colorado.

On April 23, 1970, Mr. Clement Theodore Cooper, Attorney for Contestees, filed a Motion for Suspension of Proceedings or for Indefinite Continuance on the grounds that:

1. Contestees cannot receive a fair hearing at the administrative level due to adverse news publicity surrounding the subject matter of the proceedings; that there has already been an adjudication of the issues to be determined, by way of the news media; that public speeches, statements and comments made by

officials of the Department of Interior have given the impression that the issues have been prejudged; that Contestees cannot receive a fair hearing which would be clothed "with the very appearance of complete fairness."

2. The Proceedings and the Statutes and Regulations which govern such proceedings are unconstitutional for the stated reason that:
 - a. The Executive Withdrawal Order of 1930 (Cir. 1220, dtd. June 9, 1930 (55 I.D. 127) is unconstitutional because of vagueness, ambiguity in its terms and directions and thus conflicts with the spirit and purpose of the Pickett Act (Act June 25, 1910) (36 U.S. St. al L. 847) c. 421; 43 U.S.C. #141-3 (1958).
 - b. Claims of record, which are the subject matter of the proceedings, were lawfully claimed under the authority and protection of the U.S. Mining Laws of 1872 which authorized the entry and location of mineral properties for oil shale and other minerals and Contestees made lawful entry, location and discovery as "next competitors" and thus stands in the shoes of their predecessors in interest in the chain of equitable title.
3. The Action is barred by the Doctrine of Laches.
4. Contestees have made a valuable discovery of metalliferous mineral which has been proven by investigation, research, analysis and study conducted by Contestant by and through its agents, servants, or employees and therefore the basic purpose of the proceedings becomes moot.
5. That the proceedings would be a patent denial of due process under the United States Constitution.
6. For such other and further reasons as to the Bureau may seem just, fair and equitable under the exigencies of this controversy.
7. That the proceedings are not brought in good faith.

In support of the motion, Mr. Cooper filed a brief and affidavit of counsel.

On April 27, 1970, Mr. Cooper filed a second motion entitled "Motion for Order to Disqualify any and all Employees, Agents, Servants, Hearing Examiners, Commissioners and their Retinue," stating as grounds:

1. That the aforementioned parties as classified each have an interest indirectly, in the proceeding in view of their status as employees of the Department of Interior and acting under its specific direction and control, orders and mandates.
2. That by virtue of their status as employees of said Department of Interior, and moreover, their direct connection with the Contestant, the United States of America herein, the loyalty of those persons is questionable and Contestees feel that said parties cannot afford Contestees a fair and impartial hearing.
3. That the issues now before the Bureau in Colorado Contest Number 441 have already been predetermined and said employees, etc. are acting in accordance with the mandate, order and directions of the Department of Interior and the Contestant itself.
4. That Contestees have set forth cogent arguments as to why the aforementioned persons should disqualify themselves from receiving evidence in, hearing or determining the issues herein at any time now or in the future.

In support of this motion, Mr. Cooper filed a memorandum of points and authorities.

On May 1, 1970, the attorneys for Contestant filed a memorandum opposing both motions.

I have duly considered all the materials submitted and find the grounds upon which the motions are based to be without merit. Accordingly, both motions are denied.

/s/
L. K. Luoma
Hearing Examiner

