

UNITED STATES  
v.  
CORNELIUS D. SULLIVAN  
(aka CORNEY SULLIVAN)  
and JOSIE L. SULLIVAN

IBLA 71-289

Decided April 3, 1972

Appeal from the decision Idaho 3166 of John R. Rampton, Jr., departmental hearing examiner, holding that the Flagstone Nos. 1 through 7, placer mining claims are null and void.

Appeal dismissed.

Rules of Practice: Appeals: Service on Advice Party-- Rules of Practice: Dismissal

A formal motion for summary dismissal may be granted where the appellant failed to serve the adverse party with a copy of the statement of reasons for appeal within the time prescribed by regulation, notwithstanding that tardy service was attempted after the filing of the motion.

APPEARANCES: Fred H. Snook, for the appellants; Erol R. Benson, for the appellee; Cornelius D. Sullivan and Josie L. Sullivan, pro se, in opposition to the motion for summary dismissal.

OPINION BY MR. STUEBING

By his decision of April 19, 1971, the hearing examiner declared null and void seven placer mining claims situated within sections 28,

29 and 33, T. 12 N., R. 17 E., Boise Mer., all within the Challis National Forest, Custer County, Idaho. At the contest hearing Cornelius Sullivan appeared pro se, and the contestant was represented by Erol R. Benson of the Office of the General Counsel, U.S. Department of Agriculture.

Notice of appeal was filed by appellants on May 18, 1971. There is nothing to indicate that a copy of the notice was served the Department of Agriculture as the adverse party, as required by regulation. The failure to supply proof of such service, if effected, also contravenes the regulation. However, these deficiencies are not the reason cited in support of the motion for dismissal.

The statement of reasons for appeal was filed in the office of the hearing examiner on June 9, 1971. This was the wrong office. It is provided by regulation that if a notice of appeal does not include a statement of reasons for the appeal, such a statement must be filed with this Board. 43 CFR 4.412. This error was not fatal; the hearing examiner promptly forwarded the document to the Board so that it arrived on June 11, 1971, within the prescribed time.

On July 29, 1971, the attorney for the appellee filed a motion for summary dismissal based upon the allegation that the appellants had either failed to file a statement of reasons, or alternatively, that they had failed to serve the adverse party with a copy within the time required. The motion was supported by an affidavit of non-receipt executed by counsel. A copy of the motion and affidavit was served appellants, and satisfactory proof of such service was provided.

On July 30, 1971, the Chairman of this Board wrote to the appellants advising them of the status of the case and the requirements of the applicable regulations and allowed the appellants until August 16, 1971, to submit the required proof of service.

The appellants responded by filing a written brief in opposition to the motion for summary dismissal. The gist of this statement was that because they had not understood the meaning of the term "adverse party" appellants had not served a copy of either the notice of appeal or the statement of reasons within the required 15 days after the filing of the documents, but after learning what was required they mailed copies of these documents to opposing counsel. They argue that they are proceeding in this matter without the aid of legal advice or assistance, have had no legal training, and should not

be deprived of their opportunity for appellate review because of their failure to comply with a legal technicality.

All of the documents filed by appellants in reference to this appeal are typewritten in good legal form and have the appearance of having been professionally prepared. The statement of reasons utilizes formal legal document paper upon which is printed, "FRED H. SNOOK, Lawyer, Salmon, Idaho."

Moreover, even though appellants' brief in opposition to the motion alleges that the notice of appeal and statement of reasons for appeal were belatedly served, proof of such service has never been supplied as required by 43 CFR 4.401(c). Finally, it does not even appear that opposing counsel was served with a copy of the brief which responded to his motion.

The rules require that the appellant serve the adverse parties with a copy of the notice of appeal and any statement of reasons, written arguments or briefs not later than 15 days after the filing of the document, and that proof of such service must be filed with the Board within 15 days after service. 43 CFR 4.413. The methods of service and the means of proof are prescribed in detail in 43 CFR 4.401(c). If the notice of appeal or statement of reasons is not served upon the adverse parties the appeal will be subject to summary dismissal by the Board. 43 CFR 4.402. There is no question that the Regional Attorney, Department of Agriculture, must be regarded by the contestee as an adverse party when acting for a contestant in a Government contest. United States v. Oscar Weiss et al., A-30809 (September 14, 1967), reversed on other grounds and remanded, Civil No. C-882 (D. Colo. 1969). Dismissal is at the discretion of the Department. Tagala v. Gorsuch, Udall v. Gorsuch, 411 F.2d 589 (9th Cir. 1969).

In the circumstances we find no cogent reasons for denying the motion for summary dismissal. Therefore, the motion is granted.

Accordingly, 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), this appeal is summarily dismissed.

Edward W. Stuebing, Member

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We concur:

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Newton Frishberg, Chairman

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Joseph W. Goss, Member

