

UNITED STATES  
v.  
OSCAR W. WEISS ET AL

IBLA 71-250

Decided April 1, 1974

Review of the appeal on remand from the United States District Court for the District of Colorado.

United States v. Oscar W. Weiss et al., A-30809 (September 14, 1967), and United States v. Oscar W. Weiss et al., Colo. Contest No. 400 (April 20, 1967), are set aside. Land Office Manager's decision affirmed.

Mining Claims: Contests

Under the Department's rules governing Government contests against mining claims, where an answer to a complaint is filed late the allegations of the complaint will be taken ad admitted by the contestee and the case decided without a hearing by the manager, and the Secretary is without authority to waive the rules to permit the late filing of the answer.

Administrative Procedure: Administrative Procedure Act--Contests  
and Protests: Generally--Mining Claims: Contests

A mining claim is a claim to property which may not be declared invalid except in accordance with due process of law. Due process consists of proper notice and opportunity for an agency hearing in accordance with the Administrative Procedure Act, and it suffices if the claimant is properly notified and afforded the opportunity to be heard. But there is no requirement that a hearing be held where the

contestee fails to avail himself of the opportunity for a hearing within the time provided.

APPEARANCES: Rogers N. Robinson, Esq., Office of the General Counsel, United States Department of Agriculture, for the Government; Thomas K. Hudson, Esq., Denver, Colorado, for appellant.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

This case is before us pursuant to an order of the United States District Court for the District of Colorado.

An understanding of the entire background of the case is critical to an understanding of this decision. Accordingly, by way of introduction, we will review the events which gave rise to the issues here presented.

Contest proceedings were initiated on March 16, 1966, when the Forest Service filed a complaint against Weiss and others, charging that 84 mining claims were invalid for the lack of discovery and other reasons. Although attempts to serve Weiss with a copy of the contest complaint by registered mail failed, Weiss was personally served by a Forest Service employee on April 7, 1966. He filed an answer to the complaint on May 16, 1966, 39 days later. None of the other contestees, who were also served, filed any answer.

The contest complaint which was served Weiss included the following:

NOTICE

\* \* \* \* \*

Unless the contestees file an answer to this complaint in the Colorado Land Office within 30 days after service hereof, the allegations of the complaint will be taken as admitted, and the contest will be decided without a hearing. Any answer should be filed in accordance with Title 43, Code of Federal Regulations, Part 1850, Subpart 1852, as set forth in the attached circular.

By his decision of December 1, 1966, the Colorado Land Office Manager found that since the answer by Weiss was neither filed nor

transmitted within 30 days after service, the answer could not be regarded as timely, and that the charges in the complaint must be taken as admitted. The Manager therefore held that the claims in question are invalid. The Manager's action was taken in accordance with 43 CFR 1852.1-6 and 1-7 (now recodified as 43 CFR 4.450-6 and 7). These regulations require that if an answer is not timely filed the allegations of the complaint will be taken as admitted by the contestee and the Land Office Manager will decide the case without a hearing. The penultimate paragraph of the Manager's decision explained the right of the Contestees to appeal to the Director, Bureau of Land Management, and outlined the procedure for taking such an appeal. The final paragraph of the decision stated:

If an appeal is filed, the adverse party to be served under the rules of practice is the Regional Attorney, Office of the General Counsel, U. S. Department of Agriculture, Room 13081 Federal Building, 1961 Stout Street, Denver, Colorado 80202.

Weiss appealed to the Office of Appeals and Hearings, the staff unit with delegated authority to review and decide appeals to the Director, Bureau of Land Management. In his appeal Weiss alleged that he had not been personally served in Denver, Colorado, on April 7, 1966, as shown by the case record and asserted in the Manager's decision, but rather that he was served on April 19, and that his answer, therefore, was timely filed, entitling him to a reversal of the Manager's decision and a hearing on the merits of the contest complaint. In support of this allegation, Weiss submitted his own affidavit and those of two other persons, which tended to show that Weiss was in Durango, Colorado, on April 7, and that he was personally served with a copy of the complaint in Denver on April 19.

However, while the appeal was pending in the Director's office the Regional Attorney, Department of Agriculture, advised that Weiss had not served him with a copy of the notice of appeal or the statement of reasons for appeal, as required in the Manager's decision, and that the Regional Attorney had only learned indirectly that an appeal had been taken. Weiss was afforded an opportunity to show that he had in fact served the Regional Attorney, but made no such showing. The Regional Attorney, acting on behalf of the Forest Service, Department of Agriculture, then moved for dismissal of the appeal.

By its decision of April 20, 1967, the Bureau's Office of Appeals and Hearings dismissed the appeal for the reason that the

adverse party had not been served. No determination was made in that decision as to whether Weiss had filed a timely answer to the contest complaint. This decision will be referred to hereinafter as the Bureau decision.

Weiss then appealed from the Bureau decision to the Secretary of the Interior. The Department's decision, United States v. Oscar W. Weiss, A-30809 (September 14, 1967), affirmed the Bureau's dismissal of the appeal on procedural grounds, holding that where an appeal is dismissed for procedural reasons, it is not necessary to review the merits of the decision from which the appeal was taken, and declined to do so in this instance.

Thus neither the Bureau decision nor the Departmental decision reached the merits of the Manager's decision and Weiss's contention that he did in fact file a timely answer to the contest complaint.

Weiss next filed suit in the United States District Court for the District of Colorado seeking judicial review of the three administrative decisions. Weiss v. Udall, Civil Action No. C-882. A question was raised during the course of the proceedings whether Weiss had attempted to comply with the regulations concerning service of the adverse party. While it was conceded that the Regional Attorney was never served, it appeared to the Court that service may have in fact been made upon the wrong government attorney.

By his Order of January 3, 1968, the Honorable William E. Doyle, then Judge of that Court, denied the Government's motion for summary judgment, stating:

IT IS FURTHER ORDERED, that the action of the Secretary in refusing to allow the appeal to the Bureau of Land Management was erroneous inasmuch as it was based upon the fact that the wrong government attorney received the service; and the Court strongly recommends that this matter be heard upon its merits.  
(Emphasis supplied.)

Quite clearly this order was concerned exclusively with the Secretary's affirmation of the Bureau decision dismissing the appeal on procedural grounds rather than considering the appeal on its merits. A consideration of the appeal on its merits would entail a resolution of the question of whether Weiss had been served with a copy of the contest complaint on April 7, as recited in the Manager's decision, or on April 19, as alleged by Weiss in appealing from that decision.

The Government moved the Court to set aside the Order of January 3, 1968, and this motion was denied by a second Order entered February 7, 1968, holding:

Accordingly, the motion to set aside the previous Order of the Court remanding the case to the Secretary should be and the same is hereby denied.

This seemingly left the Order of January 3 intact and unmodified. However, the text of the February 7 Order alluded critically to the "rulings of the Land Office Manager and the Bureau of Land Management," rather than to the dismissal of the appeal proceedings "by the Secretary and by the Bureau of Land Management on procedural matters," as stated in the Order of January 3, which made no mention of the Manager's decision.

The question thus presented, and which we must now resolve, is whether the remand of the case to this Department envisioned a review of the merits of the appeal from the Manager's decision, or whether it constituted an order to the Secretary to vacate not only the Departmental decision and the Bureau decision dismissing the appeal, but also the Manager's decision holding the claims invalid, and to refer the case to an administrative law judge for a full hearing of the contest on the charges contained in the original complaint.

While the actions above were pending, a considerable body of evidence had been gathered by the Federal Bureau of Investigation and by employees of the Department of the Interior and Agriculture, which evidence tended strongly to establish that Weiss had knowingly made and filed a false affidavit and had procured and filed the false affidavits of two other persons in support of his appeal from the Manager's decision.

On February 14, 1969, a Federal Grand Jury returned a True Bill of Indictment charging Weiss with four counts of violation of 18 U.S.C. § 1001, charging that he willfully and knowingly made false, fictitious and fraudulent statements and representations as to material facts within the jurisdiction of the Department of the Interior (1) in making an affidavit in support of a statement of reasons for appeal which represented that he had been served with a copy of the contest complaint on April 19, 1966, whereas, as he then knew, he had in fact been served on April 7, 1966; (2) in making an affidavit that he was in Durango, Colorado, on April 7, 1966, and that he was not served with any documents on that date, when he knew in fact those statements were false; (3) that he

obtained and used an affidavit signed by one Milan stating that he was with Weiss when he was served with the complaint at his residence on April 19, 1966, whereas as Weiss then knew, the date stated therein, being a material fact, was false; (4) that Weiss obtained and used the affidavit of one Culver stating that he consulted with Weiss in Durango, Colorado, on April 7, 1966, and that he knew Weiss was in that city on that date, whereas Weiss then knew the facts stated in the affidavit, being material facts, were false.

Weiss was tried in the United States District Court for the District of Colorado and was convicted on all four counts. United States v. Weiss, No. 69- CR-54. Imposition of sentence was suspended and Weiss was placed on probation for three years.

Coincidentally the presiding Judge was the Honorable William E. Doyle, who had previously issued the orders referred to above in the civil action.

On appeal, the conviction of Weiss was affirmed. United States v. Weiss, 431 F.2d 1402 (10th Cir. 1970). In its opinion the Court of Appeals made the following analysis:

The question of whether the complaint was served on Weiss on April 7 or April 19, 1966, was a matter the Bureau of Land Management, Department of the Interior, had to determine in its decision on the appeal from the decision of the Manager of the Colorado Land Office. That was the most important issue of the case on appeal, because if the Bureau of Land Management decided that the complaint was served on April 7, 1966, the decision of the Manager of the Colorado Land Office had to be affirmed, but if it was made on April 19, 1966, the decision had to be reversed. (Emphasis added.)

The court, under proper instructions, submitted the issue of materiality to the jury, and it, by its general verdict, found that issue against Weiss.

At page 1406.

Nevertheless, Weiss, by his attorney, continues to assert that the issues raised by the contest complaint be heard on their merits, and that this is what Judge Doyle intended by his orders of January 3, and February 7, 1968, supra. Responding to this Board's request that

the appellant and the appellee submit their respective recommendations for disposal of the case (43 CFR 4.29), counsel for appellant responded as follows:

We have at all times been anxious to have this case heard on its merits and not be disposed of by the technicalities of some Departmental Rule or Rules with which the average lawyer is totally unfamiliar, and this is the position adopted by the Honorable William E. Doyle that the matter be heard on its merits.

Our recommendation in this regard is that the above entitled case be tried to a court of competent jurisdiction solely on its merits and not on some technical rule. The statement "some court of competent jurisdiction" is used intentionally as we should like to have this matter assigned to a Court rather than to some Departmental head of the Department of the Interior.

We realize that we are bound by rules and regulations with which you are familiar and with which we are not. However, we would want a complete understanding that if the matter must first be heard by a Departmental head, that we have the right of appeal into the Federal Courts.

Quite obviously we cannot refer the matter to "some court of competent jurisdiction," as we are obliged by the Administrative Procedure Act to render a final decision for the Department, and even if it were possible to refer the matter to "some court," to do so would clearly contravene Judge Doyle's order that the case be remanded to this Department for review.

The Regional Attorney representing the Forest Service, on the other hand, recommended that this Board issue a supplemental decision affirming the decision of the Land Office Manager. This recommendation was based on an extensive analysis of the civil proceedings in the District Court and an interpretation of the two orders signed by Judge Doyle, as reflected by the reporter's transcript of the proceedings in chambers which led to the issuance of the orders.

After careful study of the orders and the transcript it is our view that the Court considered that its jurisdiction was limited to a review of the Departmental decision affirming Bureau's dismissal of the appeal for failure to serve the adverse party, and the Court's Order of January 3, 1968, remanded the case to the Secretary for a review of the appeal on its merits. This entertainment of the appeal

by Weiss would thus result in a determination of the propriety of the Manager's decision holding that the mining claims were null and void. The Court's Order of February 7, 1968, was essentially a denial of the Government's motion to set aside the first order, and while it alludes to the Manager's decision and the Bureau decision, rather than to the Bureau decision and the Secretary's decision, as the first order did, this was probably inadvertent.

Proceeding on the premise that the Court remanded this case to the Department for a review of the merits of the appeal notwithstanding the failure of the appellant to properly serve the adverse party, we hereby set aside the Bureau's decision (United States v. Weiss, Colo. Contest No. 400 (April 20, 1967)) and the Departmental decision (United States v. Weiss, A-30809 (September 14, 1967)), and take up the appeal of Weiss for consideration on its merits.

The sole question of fact presented by Weiss's appeal is whether he filed an answer to the contest complaint within thirty days after he was served. This question was subsequently resolved by the conviction of Weiss on charges that in this appeal he falsely represented the facts relating to the date on which he was served, and by the affirmation of that conviction by the Court of Appeals. Pursuant to 43 CFR 4.24(b) we take official notice of the criminal proceedings, and we find that Weiss failed to file a timely answer to the contest complaint.

The only remaining question is whether the Manager properly proceeded to decide the contest without a hearing, as directed by the regulation, supra.

Clearly, the Court of Appeals, in affirming the conviction of Weiss, was of the opinion that because of the late filing of the answer to the contest complaint the decision of the manager had to be affirmed. This was the essential materiality of Weiss' offense.

In the very recent case of Sainberg v. Morton, 363 F. Supp. 1256 (D. Ariz. 1973), the Court dealt at length with this precise issue. That case also dealt with the tardy filing of an answer to the complaint in a mining claim contest, and the Court noted that the plaintiffs' contention was "\* \* \* one which the plaintiff, by their attorneys, have laboriously strained to fabricate in order to seek the relief requested. It appears that plaintiffs attempt to confuse the Court \* \* \*." In holding that the Land Office Manager correctly rejected Sainberg's late answer, and that he had a duty to dismiss the answer, the Court said, at 1263:

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The Secretary's rules are reasonable in giving a period of thirty days in which to file an answer. In order to carry out an orderly system of justice the Secretary has not established a grace period or retained discretion in the application of the regulation. Plaintiffs ask this Court to require the Secretary to waive his own mandatory regulation because the answer was filed one day late as a "result of mistake, inadvertence and excusable neglect". Nowhere in the regulations is the authority given the Secretary to waive his regulations because of excusable neglect or mistake. The defendant is required to abide by his own regulations, so are plaintiffs. If the time requirement was waived this would disturb the Secretary's long-standing procedure of administering the mining laws and other land laws fairly. The regulations would be a farce if they could be applied only if and when the parties felt like complying therewith.

The rule is one of long standing which has been similarly applied in many cases over the years. Citing Chapman v. Sheridan Wyoming Coal Co., 338 U. S. 621 (1950), and McKay v. Wahlenmaier, 226 F.2d 35 (D.C. Cir. 1955), the Department held that the Secretary could not waive the regulation providing for a default decision against a contestee if he fails to answer timely. United States v. J. Hubert Smith, 67 I.D. 311 (1960). In the Smith case, although a Government contest was brought in the name of the United States, the contest, as here, was initiated at the instance of the Forest Service. The rule has been applied to the same effect where the United States was not a party, but the contest one between private parties contending for a homestead entry. Earl D. Deater v. John C. Slagle, A-28121 (May 24, 1960). Other appellate decisions in which this Department has affirmed the propriety of the manager's actions in cases similar to this one include United States v. Jensen, A-28789 (August 6, 1962); United States v. Gilligan, A-28857 (February 19, 1962); United States v. Allen, A-28718 (July 26, 1962); United States v. Garcia, A-28889 (July 30, 1962); United States v. Bradley-Turner Mines, Inc., A-29813 (November 19, 1963); Grace E. Hutchins, A-29297 (Supp. II) (May 25, 1964); United States v. Evans, A-30923 (September 30, 1968); United States v. Holcomb, A-31019 (August 21, 1969); United States v. Ernsbarger, 1 IBLA 84 (1970); United States v. Devine, 2 IBLA 258 (1971); United States v. Storer,

3 IBLA 151 (1971); United States v. Sainberg, 5 IBLA 270 (1972), *aff'd sub nom Sainberg v. Morton*, *supra*; United States v. McCormick, 5 IBLA 382, 79 I.D. 155 (1972); United States v. Spaulding, 8 IBLA 297 (1972); James D. Lindsay, 10 IBLA 238 (1973); United States v. Honeycutt, 15 IBLA 184 (1974).

A mining claim is a claim to property which may not be declared invalid without proper notice and an adequate opportunity for an agency hearing in accordance with due process of law. Administrative Procedure Act, 5 U.S.C. § 554 (1970); United States v. O'Leary, 63 I.D. 341 (1956). Due process consists of notice and opportunity for hearing, and it suffices if the claimant is afforded the opportunity to be present and heard. United States v. McCall, 1 IBLA 115 (1970). But there is no requirement that a hearing be held where the contestee has been given due notice in the form of an adequate contest complaint, properly served, and fails thereafter to avail himself of the opportunity for a hearing within the time provided. United States v. Garnett, A-28545 (January 31, 1961). The requirement for the timely filing of an answer to a contest complaint is mandatory in nature and jurisdictional in character. Moreover, appellant's criminal misrepresentation of facts material to this appeal clearly preclude any possible claim to equitable consideration.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the Land Office decision declaring the mining claims involved in contest Colorado 400 is affirmed.

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Edward W. Stuebing  
Administrative Judge

We concur:

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Newton Frishberg  
Chief Administrative Judge

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Frederick Fishman  
Administrative Judge

