

UNITED STATES  
v.  
HOWARD S. MCKENZIE

IBLA 70-94 (Supp. 1)

Decided April 17, 1975

Recommended decision of Rudolph M. Steiner to declare mining claims invalid.

Set aside and remanded.

1. Administrative Procedure: Burden of Proof -- Evidence: Burden of Proof -- Mining Claims: Contests -- Rules of Practice: Evidence

In a mining contest a mining claimant is the true proponent under the Administrative Procedure Act, 5 U.S.C. § 556(d), of a rule or order that he has complied with the mining laws, and he has the ultimate burden of proof -- the risk of nonpersuasion -- to show by a preponderance of the evidence that there is a valuable mineral deposit on the claim, when the Government has made a prima facie case of lack of such a discovery.

2. Administrative Procedure: Administrative Law Judge -- Evidence: Generally -- Mining Claims: Contests

An Administrative Law Judge has a duty to conduct a hearing in such a manner that all available relevant facts in a mining contest will be adduced. He should take special care to do so where a party is without counsel and there is confusion concerning the status of purported tendered evidence.

3. Evidence: Generaliiy -- Mining Claims: Hearings -- Rules of Practice:  
Evidence--Rules of Practice: Hearings

Evidence submitted on appeal after an initial decision in a mining contest may not be considered or relied upon in making a final decision but may only be considered to determine if there should be a further hearing.

4. Mining Claims: Hearings--Rules of Practice: Hearings  
A further hearing in a mining contest may be ordered where the particular circumstances so warrant it.

APPEARANCES: Richard L. Fowler, Office of the General Counsel, United States Department of Agriculture, Albuquerque, New Mexico, for the United States;  
Howard S. McKenzie, pro se.

OPINION BY ADMINISTRATIVE JUDGE THOMPSON

In United States v. McKenzie, 4 IBLA 97 (1971), this Board affirmed the September 3, 1969, decision of the Chief, Branch of Mineral Appeals, Office of Appeals and Hearings, Bureau of Land Management, which affirmed a hearing examiner's decision dated April 1, 1969, declaring Howard McKenzie's Landsend Nos. 2 and 3 claims invalid and rejecting his mineral patent application NM-145 for the claims.

In that decision, the Board stated that:

[T]his decision will not become final until 30 days from date of service of this decision upon the appellant. [Footnote omitted] Appellant may within that period, transmit to this office his additional reasons and offer of proof for a further hearing. In this event, this decision will be suspended pending final decision on his request.

Subsequently, McKenzie did submit additional reasons and an offer of proof to the Board consisting of an Additional Tender of Evidence, with appended exhibits 101-16 and a Partial Tender of

Evidence with appended exhibits 1-4. Based on that showing, on June 20, 1972, the Board ordered the case to be transmitted to the Division of Hearings, Office of Hearings and Appeals, for further proceedings "to clarify the evidentiary record in this contest." For that reason, the Board did not answer a motion to have the tender made a part of the record.

In response to our order, a hearing was held in Albuquerque, New Mexico, and a recommended decision was issued by Administrative Law Judge R. M. Steiner on January 8, 1974. Judge Steiner concluded that "the Contestee has failed to offer any probative evidence which would justify modification of the findings or conclusions set forth in the Board's decision of November 19, 1971."

Although we agree with Judge Steiner that the present evidentiary record would not justify modification of the Board's decision, for the reasons stated below we reluctantly conclude that the case must be remanded for still another hearing.

[1] In remanding this case, we are not unmindful of the effect of the allocation of burden of proof in government mining contests. Although the Government has assumed the burden of presenting a prima facie case on each issue presented in the contest complaint, under the Administrative Procedure Act, the claimant in a mining contest is the true proponent of a rule or order that he has complied with the mining laws and consequently has the ultimate burden of proof--the risk of nonpersuasion. 5 U.S.C. § 556(d); United States v. Springer, 491 F.2d 239, 242 (9th Cir. 1974), cert. denied, U.S. , 95 S. Ct. 60 (1974); Foster v. Seaton, 271 F.2d 836, 838 (D.C. Cir. 1959); United States v. Taylor, 19 IBLA 9, 25, 82 I.D. (1975). The Department will reject a patent application and declare a claim invalid if a claimant fails to meet his burden of proof. Id. In Cameron v. United States, 252 U.S. 450, 460 (1920), the Supreme Court said that the Department of the Interior is "charged with seeing \* \* \* that valid claims [are] recognized, invalid ones eliminated, and the rights of the public preserved."

In order to have sufficient basis for an informed determination on the issue of discovery, this Department has in some cases, including our prior order in this case, remanded cases for further hearing on factual issues. E.g., United States v. Ideal Cement Co., 5 IBLA 235, 79 I.D. 117 (1972), appeal pending, Ideal Basic Industries, Inc., v. Morton, Civ. No. J-12-72, D. Alas.; United States v. Kosanke Sand Corp. (On Reconsideration), 12 IBLA 282, 80 I.D. 533 (1973); United States v. Wells, 11 IBLA 253 (1973). See also United States v. DeZan, A-30515 (July 1, 1968).

Appellant was afforded the opportunity to comment upon Judge Steiner's recommended decision. Most of his comments consist of a criticism against the past decisions in his case. Much of what he says is unfounded and irrelevant. Appellant's original Tender of Evidence to this panel suggested that he might be able to present additional evidence which would support a conclusion that there was sufficient barite which could be extracted and processed from the claim at a profit. That tender was presented by his attorney of record then. At the hearing on remand, appellant was not represented by counsel. The fact an appellant does not have legal counsel cannot serve as means for obtaining greater rights to public lands than he would otherwise have. Nevertheless, it does tend to explain part of the confusion shown in the remand hearing as to just what was in the evidentiary record.

Three witnesses testified at the hearing on remand: McKenzie, and two witnesses for the Government. The only documentary evidence admitted into the record on McKenzie's behalf was a report by Harry Birdseye marked Appellant's Exhibit #1. <sup>1/</sup> This report was also part of the Additional Tender of Evidence and is also marked Exhibit 103. The remainder of the Additional Tender of Evidence was not marked, offered or admitted at the hearing. These documents contain information on the costs of operating the mine and on the quantity and quality of mineral on the claims. All the documents admitted into evidence, the Additional Tender of Evidence and the Partial Tender of Evidence (not marked or offered at the hearing), were transmitted to this Board in a packet marked "Exhibits."

Early in the hearing the following conversation occurred.

JUDGE STEINER: Do you have evidence that was not available at the last hearing?

THE CONTESTEE: Evidence that was not available at the last hearing?

JUDGE STEINER: Yes.

THE CONTESTEE: There's been a lot of evidence through briefs and evidence in support of this hearing that it is my understanding that has been entered into the record \*

\* \*

(Emphasis added). (Tr. 13-14).

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<sup>1/</sup> Birdseye testified for McKenzie at the first hearing. He prepared Appellant's Exhibit #1 subsequent to the first hearing, but died in an airplane crash before the second hearing.

The Administrative Law Judge did not question him further for clarification of what he understood was in the record as evidence, except in relation to certain testimony by the claimant.

THE CONTESTEE: \* \* \* And, his sampling in his last report is giving -- is given in this report, the quality of his samplings taken from these deeper ditches or deeper pits. The -- (interrupted)

JUDGE STEINER: When was the date of that report? When was it made?

THE CONTESTEE: I'll have to look it up, but it'll just take a moment. I know without looking, April 25th.

JUDGE STEINER: What year?

THE CONTESTEE: Nineteen-seventy-two (1972).

JUDGE STEINER: Did you wish to offer that in evidence?

THE CONTESTEE: It is my understanding that it is already a part of the record as evidence in support of this hearing.

JUDGE STEINER: May I see it, please?

THE CONTESTEE: Yes, sir.

MR. FOWLER: A reproduced page and this is mere copy.

JUDGE STEINER: The hearing will be in recess for five minutes.  
(The hearing was in recess for five minutes.)

JUDGE STEINER: On the record. Let the record show that the Birdseye Report, dated April 25, 1972 was submitted to the Solicitor on or about May the 5th, 1972 attached to a document entitled "Additional Tender of Evidence". Do you have a copy of that Mr. Fowler?

MR. FOWLER: Yes, sir, we do.

JUDGE STEINER: Do you have any objection to the introduction of that exhibit?

MR. FOWLER: Your Honor, I have an objection to the introduction as evidence. The--I think the record will show that we did not file any objection to the Board considering these documents for the purpose of determining whether a rehearing should be established and the Board, in its Order of June 20, stated that because of these circumstances the Tender is approved and our failure to object and I'm quoting now, "Therefore, as the reasons and offers of proof tendered by Contestee, justify further proceedings to clarify the evidentiary record of this Contest, the Contestee's motion for a further hearing is granted." So, at that point, the Tender of Evidence was held forth as a reason for this re-hearing and we certainly did not object if Mr. McKenzie had done further work which would give further light on the merits of his mining claims to having that re-heard. \* \* \* Now, the problem with Mr. Birdseye's report is that it contains a great deal of inference and opinion and without Mr. Birdseye here to examine, we feel that it would be improper to simply accept his report. \* \* \* [T]his type of report is considered by, at least Judge Dalby, to be the kind of hearsay that should not be received. So, I have that problem with this document and I object to it.

JUDGE STEINER: I will consider the Report as having been offered in evidence. The objection is over-ruled and that Report will be received. I have a copy, so you may have your copy back. Let it be marked Appellant's Exhibit No. 1.

(The document referred to was marked Appellant's Exhibit No. 1 for identification and made a part of the record hereof.)

THE CONTESTEE: How's that marked, sir?

JUDGE STEINER: Appellant's Exhibit No. 1

THE CONTESTEE: Now, that's the Report problem, correct?

(Emphases added). (Tr. 19-23). From this record, it is clear that only Exhibit 1 of the Additional Tender of Evidence was made a part of the evidentiary record at the hearing.

Judge Steiner took no steps to answer McKenzie's inquires or to explain what evidence besides Exhibit 1, was in the evidentiary record and what evidence was not. While McKenzie, with some justification believed that the entire Additional Tender of Evidence was in the record as evidence, rather than as a mere offer of proof to support a further hearing, counsel for the Forest Service believed with equal justification that it was not.

The record reflects both parties' "understandings." McKenzie, who felt that his tender of evidence was part of the evidentiary record made no effort to submit additional evidence. Also, he gave no testimony to establish a proper foundation for the tender of evidence, such as the costs of the milling, operation, the roads, etc. Counsel for the Forest Service, who felt the evidence was not in the record, made no effort to cross-examine McKenzie or any other witness on the accuracy and relevancy of the tender of evidence.

[2] The Administrative Law Judge should have done more to clarify the status of the tendered evidence. An Administrative Law Judge is vested with general authority to conduct a hearing in an orderly and judicial manner. 43 CFR 4.452-4. He may call and question witnesses. Id. He may state issues upon which he may wish to have evidence presented. 43 CFR 4.452-5. He may admit documentary evidence if pertinent to any issue and may question any witness concerning relevant issues. 43 CFR 4.452-6. In short, he has a duty to conduct a hearing in such a manner that all available relevant facts in a hearing will be adduced. He should take special care to do so where a party is without counsel, and there is confusion concerning the status of the tendered evidence. See Stewart v. Cohen, 309 F. Supp. 949 (E.D. N.Y. 1970).

[3] We have before us a tender of evidence which was not properly submitted at the hearing we previously ordered. Generally, the basis for a decision made after a hearing is the evidentiary record made at the hearing. 43 CTR 4.24. Evidence submitted on appeal after an initial decision in a mining contest may not be considered or relied upon in making a final decision but may only be considered to determine if there should be a further hearing. United States v. Gunn, 7 IBLA 237, 79 I.D. 588 (1972). This remains the status of the tendered evidence. Although the counsel for the Forest Service generally objected to it incidental to McKenzie's

mention of the Birdseye report, the Administrative Law Judge ruled only on the report and not the remainder of the tender. We note that the Forest Service's objection of hearsay evidence being inadmissible is not acceptable for that reason alone. However, a proper foundation must be laid for such evidence, and the weight to be given to hearsay evidence depends upon various factors such as relevance, competency and credibility. Navajo Tribe of Indians v. State of Utah, 12 IBLA 1, 80 I.D. 441 (1973).

[4] We realize that a further hearing is both expensive and time-consuming to all parties concerned. Nevertheless, because of the particular circumstances existing here, we believe one is warranted. We suggest to appellant that this is his final opportunity to present evidence of his compliance with the requirements of the mining laws as to discovery of a valuable mineral deposit.

At the hearing, McKenzie will have the burden of showing by a preponderance of the evidence that a prudent man would be justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a paying mine. In order to meet this test, McKenzie will have to show there is a likelihood that the minerals on the claims can be mined, removed and disposed of at a profit. Among the factors he must show for each claim by probative evidence are:

- (a) expected costs of the extraction, beneficiation, and other essential costs of the operation necessary to mine and sell the mineral, including capital and labor costs;
- (b) quantity of mineable mineral on the claims;
- (c) average grade or quality of mineral on the claim; and
- (d) price at which the mineral will be sold, and expected returns.

The above evidence should focus on current estimates of costs and prices. We caution appellant to devote his energies to the presentation of evidence. Further criticism, without evidence, will avail him nothing. He may in any further briefs in this case analyze evidence which is in the record. However, the hearing shall be strictly for the purpose of affording him the opportunity to present the proof originally tendered to justify a further hearing and any further evidence on the factual matters set forth above. The Forest Service, of course, will have the opportunity to submit any rebuttal evidence.

If appellant fails to come forward and submit evidence with a proper foundation for it, which is sufficient to meet his burden of persuasion in this case, he will have to suffer the consequences of his failure to do so, namely, the rejection of his application and the nullification of his claim.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1(3), the recommended decision is set aside and the case remanded to the Hearings Division for further evidentiary proceedings consistent with this decision and a new recommended decision by the Administrative Law Judge.

Joan B. Thompson  
Administrative Judge

We concur:

Anne Poindexter Lewis  
Administrative Judge

Frederick Fishman  
Administrative Judge

