

UNITED STATES
v.
ROBERT B. McELWAINÉ

IBLA 74-311

Decided July 7, 1976

Appeal from a decision of Administrative Law Judge Robert W. Mesch rejecting mineral patent applications and holding four mining claims null and void for lack of a discovery of a valuable mineral deposit. ES 5642.

Affirmed in part, set aside in part, and remanded.

1. Administrative Practice -- Mining Claims: Contests -- Mining Claims: Hearings

The right to a hearing on disputed issues of fact involving mining claims includes the right to adequate notice of the grounds upon which a claim's invalidity is asserted.

2. Administrative Practice -- Mining Claims: Contests -- Mining Claims: Hearings

A Government contest complaint which asserts the invalidity of a claim because of insufficient quantity and quality of the located mineral within the limits of the claim does not put into issue the existence of excess reserves within the limits of a claim.

3. Administrative Practice -- Mining Claims: Contests -- Mining Claims: Hearings

Where the alleged ground of invalidity of a claim was not charged in the complaint, and was not a matter of contention at the hearing, invalidation of

the claim on such ground is improper, despite some evidence to support it, absent an opportunity for the contestee to present evidence on such issue where it appears that there is other pertinent evidence that may be submitted on that issue.

4. Administrative Practice -- Mining Claims: Contests -- Mining Claims: Hearings -- Mining Claims: Patent

Where on appeal from a decision sustaining the Government's challenge of a patent application it is determined that the alleged ground of invalidity was one not raised in the complaint or at the hearing, the decision rejecting the patent application will be set aside and the Government will be afforded an opportunity to amend its complaint to embrace the charge. Where the Government does amend its complaint the mineral claimant will be granted the right to an evidentiary hearing on such issue.

APPEARANCES: Robert M. McHenry, Esq., Little Rock, Arkansas, for appellant; Michael L. Cruse, Esq., Office of the General Counsel, United States Department of Agriculture, for the appellee.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

Robert B. McElwaine has appealed from the decision of Administrative Law Judge Robert W. Mesch, dated April 16, 1974, rejecting mineral patent applications and declaring four mining claims null and void for lack of a discovery of a valuable mineral deposit. The subject claims, MAC Nos. 1, 3, 4 and 5 lode mining claims, as well as the MAC No. 2 claim for which a patent has been issued, are situated in secs. 25 and 26, T. 4 S., R. 29 W., 5th P.M., Polk County, Arkansas, just within the boundaries of the Ouachita National Forest. The claims were located on July 9, 1964, for tripoli or amorphous silica, a highly siliceous sedimentary rock used principally as a polishing powder for nonferrous metals. On March 15, 1969, appellant made application for patent of all five MAC claims. While a patent subsequently issued for MAC No. 2, the Director, Eastern States Office, Bureau of Land Management, filed a contest complaint against the remaining four claims on May 24, 1973, at the request of the Forest Service, Department of Agriculture.

The complaint consisted of a single charge: "A discovery of mineral in sufficient quantity and quality to constitute a valid discovery does not exist within the limits of the claims." The allegation of the complaint was timely denied and a hearing was held on October 12, 1973, at Little Rock, Arkansas. The Government presented the testimony of its mineral examiner, Edward W. Read, to the effect that insufficient work had been done to establish "beyond a shadow of a doubt" (Tr. 48) that there was sufficient quantity and quality of tripoli within the limits of the claims to constitute a discovery.

The contestee's case consisted of his own testimony and that of Charles G. Stone, a geologist with the Arkansas Geological Commission. Stone disagreed with the Government mineral examiner's contention that further exploration would be needed in order to determine whether a sufficient quantity and quality of tripoli to support mining operations existed within the limits of the claims that would justify a prudent man in the further expenditure of his labor and means. (See, e.g., Tr. 105, 115).

The contestee testified in his own behalf. McElwaine, a consulting geologist, declared that it was obvious that tripoli was present on all the claims and that he had performed dozer cuts or trenches on each of the claims merely to comply with the requirements of the mining law.

Judge Mesch, in his decision, ruled that insofar as the charge in the complaint was concerned, by showing claimant's failure to perform sufficient exploratory work to delineate the quantity and quality of the tripoli within the limits of the claim, the Government had presented a prima facie case, albeit a weak one (Dec. 11). Nevertheless, he found that the contestee had adequately rebutted or overcome the Government's presentation (Dec. 17). We believe that the record adduced at the hearing completely accords with the Judge's decision on this point and we affirm his findings on this issue.

Judge Mesch did not limit his consideration to the issue as framed in the complaint but rather noted that two other issues were raised by the Forest Service, one at the hearing and the other in its post-hearing brief. In regard to the issue raised at the hearing, the Judge noted that the Forest Service contended that the claims were invalid "because the mineralization is not a valuable mineral deposit inasmuch as it cannot be marketed competitively with other similar deposits located elsewhere in the United States." (Dec. 2). On this issue the Judge found that "the Forest Service did not make a prima facie case, and

the contestee's evidence does not cure any of the defects in the Government's case." (Dec. 18). We note that this issue was not raised in the complaint but rather surfaced at the hearing. Inasmuch as the Judge found for the contestees on this issue, a finding in which we concur, contestees were obviously not prejudiced by its consideration and we affirm the Judge's decision.

Finally, Judge Mesch noted that in its post-hearing brief the Forest Service raised a new issue, namely, "the claims are invalid because the contestee controls other patented mining claims [the Yount claims] containing the same mineralization; and at the rate that the contestee, under the most favorable or imaginary conditions, plans to mine and market the material, the mineralization within the patented claims is adequate to supply the contestee's needs for many decades." (Dec. 2). As regards this issue Judge Mesch found that while no prima facie case was made by the Government, the contestee's evidence sufficiently supported the Government's allegation so as to necessitate the rejection of the patent applications. (Dec. 19-21).

Appellant vigorously protests the Judge's actions in considering an issue which was admittedly not raised in the contest complaint, but surfaced only after completion of the hearing. The result of this procedure, appellant contends, was that the validity of the claims was determined on a ground that the contestee had no chance to consider, much less rebut. The Forest Service, for its part, argues that there is no substance to this argument since the evidence upon which the Judge based his determination was provided by the contestee, and further that the contestee was put on notice by the contestant's post-hearing brief that the issue of excess reserves was involved and should have availed himself of the opportunity to argue the issue.

[1] We are unable to accept the Forest Service's propositions. First, we note that Judge Mesch was cognizant of the problems created in deciding the case on an issue not raised in the complaint. Thus, he declared that:

[i]t could be argued that this issue should not be considered since it was not timely presented and that the complaint challenging the validity of the claims should be dismissed because the evidence does not support the two issues raised at the time of the hearing. This might be a proper course of action, however, it would not be of any benefit to anyone. In view of the record that has been made, I could not properly direct that a patent be issued, the responsible authorities within the Department could

not properly issue a patent and the Government would, undoubtedly, simply bring another contest proceeding attacking the validity of the claims. See United States v. United States Borax Company, 58 I.D. 426 (1943); United States v. Clare Williamson, 75 I.D. 338 (1968); United States v. Henrietta Bunkowski, 79 I.D. 43 (1972).

It might also be argued that I should reopen the record and give the contestee an opportunity to present additional evidence on the third issue. I doubt that this would serve any useful purpose inasmuch as the evidence that supports the issue is exceedingly clear and free from doubt, and it seems extremely unlikely that the contestee could produce evidence that would rebut or destroy the evidence developed as a part of his testimony. Accordingly, I have decided that it would be best to bring the matter to an expeditious conclusion at this state of the proceedings. If the contestee feels that he can overcome the evidence that presently exists with respect to the third issue, he can appeal this decision and seek an order from the Board of Land Appeals reopening the case.

(Dec. at 20-21).

Second, the fact that contestee supplied the evidence upon which a determination of excess reserves was made is irrelevant to the issue of adequate notice. This is particularly true in the instant case where proof of the adequacy of quantity and quality of the deposit, based on its similarity with other deposits from which contestee had successfully mined tripoli, also tends to prove excess reserves. It may be that the success of contestee's patent applications rests on his ability to successfully negotiate a path between the Scylla of excess reserves and the Charybdis of inadequate quantity and quality. But appellant has a right to be put on notice of the whirlpool as well as of the monster.

[2] We find it impossible to read the contest complaint as embracing a charge of excess reserves. At the hearing, when the Government's attorney broached this subject in a question to the contestee, the following colloquy took place:

Q. Based on that calculation then, you could probably operate fifty years out of your Yount claims, is that correct?

MR. McHENRY:

Your Honor, excuse me, Mike, but whether or no this particular property will be inordinately profitable to Mr. McElwaine and that he'll get a lot more tripoli than he can use in his lifetime, I do not think is of legal significance in this hearing. Therefore, I would object to that form of question on the grounds --

JUDGE MESCH:

I don't think this is within the charge of the complaint, unless you can convince me otherwise.

MR. CRUSE:

I withdraw the question.

(Tr. 159-60).

The Government's attorney did not contend that the charge of excess reserves was embraced by the single ground stated in the complaint. Rather he acquiesced in the Judge's ruling that it was not an issue.

Nor can we accept the proposition implicitly advanced by the Government that the presentation of a prima facie case with respect to one issue necessary for discovery requires the mineral claimant to prove all of the elements of discovery regardless of whether or not any evidence has been presented on such issues by the Government. The efficacy of Government contest hearings lies equally in right to notice as well as an opportunity to be heard. The right to a hearing would be empty indeed if it entailed no further right to be apprised of the nature of the hearing. No mineral claimant could ever be certain of the issues involved in his contest if prima facie proof of one charge shifted to him the burden of preponderating on a broad range of unarticulated possible charges. A result of such an approach would be to greatly increase the length and costs of the hearing since contestees would feel obliged to prove every conceivable issue upon which a finding of invalidity could be based. It is not too heavy a burden to place upon the Government that it clearly delineate the grounds upon which a claim's invalidity is alleged. See United States v. Foster, 65 I.D. 1, 11, aff'd, Foster v. Seaton, 271 F. 2d 836 (D.C. Cir. 1959): "[O]nce the Government had produced evidence to show that no discovery had been made, it was up to the contestees to overcome that evidence." (Emphasis supplied).

As to the contention that the contestee had adequate notice of the charge of excess reserves when the allegation appeared in the post-hearing brief of the Government, the contestee's attorney correctly points out that the decision of the Judge is circumscribed by the record adduced at the hearing. See, e.g., 43 CFR 4.452-8(b). United States v. Zweifel, 11 IBLA 53, 100-01, 80 I.D. 323, 344-45 (1973). The contestee complains not about an inability to present argument to the Judge or this Board, but rather the lack of opportunity to present evidence. The Judge's decision can be seen as a finding that there are no disputed issues of fact as to the existence of the reserves and thus there is no requirement to reopen the hearing, and indeed, that reopening would serve no useful purpose.

The issue of excess reserves is manifestly a question of fact, and it goes without saying that facts adduced at a hearing, whether presented by the Government or the contestee, can be used to determine a claim's invalidity. But a contestee faced with a challenge on the grounds of inadequate quantity and quality of reserves would quite naturally present different evidence from that he would on an issue of excess reserves. This need not result in conflicting evidence. Rather, there would be a difference in the type of evidence presented. Thus, in rebuttal to the charge of the complaint contestee attempted to show the similarity of the MAC claims to the Yount claims as regards quality and would naturally attempt to extend geologic inference to its largest parameters to prove quantity. But had the contest complaint explicitly charged as well contestee's control of excess reserves as a grounds of invalidity, contestee might well have gone into greater detail on the nature of the present market demand and the reasonably foreseeable demand, the extent of the reserves on the Yount claims and other relevant factors.

[3] In this case the question of excess reserves was not included in the complaint, nor was it discussed at the hearing. It arose only in the post-hearing brief for the contestant. It was error for the Administrative Law Judge to consider this charge after the hearing. Compare Harold Ladd Pierce, 3 IBLA 29 (1971), which held that a decision holding mining claims to be null and void will be vacated where the contest did not proceed upon any ground stated in the complaint and the contest will be dismissed without prejudice; and United States v. Northwest Mine and Milling, Inc., 11 IBLA 271 (1973), which held that in a mining contest a

matter not charged in the complaint cannot be used as a ground to find a claim invalid unless it has been raised at the hearing and the contestee has not objected. ^{1/}

[4] We are, however, in agreement with the Judge that doubts on the issue of excess reserves are of such a magnitude that we could not properly order the issuance of patent at the present time. See Cameron v. United States, 252 U.S. 450, 460 (1920); United States v. Kosanke Sand Corp. (On Reconsideration), 12 IBLA 282, 80 I.D. 538 (1973).

Where a contestee in a mining contest preponderates sufficiently to overcome the Government's prima facie case on an issue raised by the evidence in a mining contest and there is no evidence on other essential disputed issues, the contest should be dismissed unless a patent application is being contested, in which case a further hearing must be ordered to resolve other essential issues to determine whether the application may be allowed. United States v. Taylor, 19 IBLA 9, 82 I.D. 68 (1975).

From our examination of the record, particularly the Judge's suggestion that the issue of excess reserves was not within the charge, the Administrative Law Judge's decision and the contentions in the appellant's brief, we cannot assume that all the pertinent evidence on this issue is before the Board. Therefore, we conclude that a further hearing is necessary if the United States desires to challenge the claims on the issue of excess reserves.

Accordingly, we will allow the Forest Service 60 days to request the Bureau of Land Management to institute an amended complaint based on the control by contestee of excess reserves of tripoli. The 60 days will commence as of the receipt by the Forest Service of this decision.

^{1/} We are not unsympathetic with the difficult position in which this case placed Judge Mesch. It seems clear that the true import of appellant's testimony was not recognized until after the close of the hearing. Judge Mesch correctly noted that having been apprised of this possible ground of invalidity he could not properly order a patent to issue. We believe it would have been within the Judge's power to reopen the hearing, inform the parties of his concern and permit the Government to amend its complaint. A subsequent hearing could then be held, after permitting the mineral claimant sufficient opportunity, if needed, to prepare his case. We cannot, however, accept the procedure followed herein.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed in part, set aside in part, and remanded for further action consistent with this opinion.

Douglas E. Henriques
Administrative Judge

We concur:

Frederick Fishman
Administrative Judge

Martin Ritvo
Administrative Judge

