

INTERIOR BOARD OF LAND APPEALS

Yates Petroleum Corp., et al.

136 IBLA 249 (September 16, 1996)

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YATES PETROLEUM CORP., ET AL.

IBLA 96-516

Decided September 16, 1996

Petition seeking permission to file an interlocutory appeal from a ruling of Administrative Law Judge Patricia McDonald excluding testimony from a witness on the grounds that such testimony might invade the province of the Judge.

Permission denied.

1. Administrative Procedure: Hearings—Evidence: Admissibility—Hearings—Rules of Practice: Appeals: Hearings—Rules of Practice: Hearings

Since the regulations permitting interlocutory appeals are, by their express terms, limited to those appeals involving a controlling question of law whose proper resolution would materially advance final decisionmaking, parties objecting to evidentiary determinations by an Administrative Law Judge rendered in the course of a hearing are generally precluded from seeking interlocutory review of such determinations. Such rulings are normally subject to review only in the context of an appeal from an adverse substantive decision by the Administrative Law Judge.

APPEARANCES: Mary Lynn Bogle, Esq., and Ernest L. Carroll, Esq., Artesia, New Mexico, for petitioner Yates Petroleum Corporation; Harold L. Hensley, Esq., Gregory J. Nibert, Esq., and James A. Gillespie, Esq., Roswell, New Mexico, for petitioners Devon Energy Corporation, and Pogo Producing Company; Charles C. High, Jr., Esq., El Paso, Texas, and James R. Bird, Esq., and Kim E. Dettelbach, Esq., Washington, D.C., for Potash Association of New Mexico.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

Yates Petroleum Corporation, Devon Energy Corporation, and Pogo Producing Company have submitted a petition seeking permission to file an interlocutory appeal from a ruling by Administrative Law Judge Patricia McDonald entered in the course of a hearing ordered by the Board, pursuant to 43 CFR 4.415, in a decision styled Yates Petroleum Corp., 131 IBLA 230 (1994). For the reasons provided below, we decline to grant permission to file an interlocutory appeal on the question presented.

[1] The general rules governing the filing of interlocutory appeals are set forth at 43 CFR 4.28 <sup>1/</sup> and provide:

There shall be no interlocutory appeal from a ruling of an administrative law judge unless permission is first obtained from an Appeals Board and an administrative law judge 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.

A few initial observations are in order with respect to this provision. It is obvious from the negatory manner in which it is phrased (i.e., "[t]here shall be no interlocutory appeal," and "[p]ermission will not be granted") that interlocutory appeals are generally viewed with disfavor. (Emphasis supplied.) The reasons for this are obvious. First of all, the pendency of an interlocutory appeal, even where the proceedings below have not been stayed by an order of the Board, necessarily infests the ongoing hearing with an undesired tentativeness as the parties involved await the Board's decision. Participants are naturally reluctant to proceed as if no appeal were underway and may be unwilling to commit resources of time and money continuing in accordance with an initial ruling when they are fully aware that that ruling might be reversed at any time. On the other hand, in those cases in which proceedings have actually been stayed during Board consideration of the matter, the very real possibility exists that consideration of the interlocutory appeal may retard rather than advance final decisionmaking.

Then, too, interlocutory appeals, which, by their nature, require immediate attention from the Board, are extremely disruptive to the orderly processing of the Board's docket. Cases which have been pending before the Board far longer must often be put aside so that expedited consideration may be afforded the interlocutory appeal. And these cases are negatively impacted even if the Board ultimately grants the petition and rules on the question presented. Moreover, frequent intervention in ongoing hearings could serve to undermine the authority and respect properly accorded to Administrative Law Judges and to generate increased numbers of interlocutory petitions by parties unhappy with an Administrative Law Judge's ruling, thereby leading to even greater disruptions of both the hearings and appeals processes. It is in recognition of all of these potential

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<sup>1/</sup> Technically, of course, petitions for interlocutory review of matters arising out of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §§ 1201 to 1328 (1994), are governed by specific regulations appearing at 43 CFR 4.1124 and 4.1272. In substance, however, they replicate the general rules discussed in the text of this opinion.

adverse impacts that the regulation, by its terms, severely limits interlocutory appeals only to questions of controlling law whose proper resolution would materially advance final decisionmaking.

In view of the foregoing, it would be expected that the number of interlocutory appeals taken up for consideration by the Board has been minuscule. This, indeed, has been the experience of the Board. In the over 25 years of its existence, there have been fewer than 20 reported decisions rendered on interlocutory appeals. And virtually all of these appeals have involved legal questions as to the proper limits of Departmental jurisdiction. See, e.g., Lundgren v. BLM, 126 IBLA 238 (1993); McPeck Mining v. OSM, 101 IBLA 389 (1988); State of Alaska v. Thorson, 76 IBLA 264 (1983). The instant appeal, however, presents an issue decidedly different from any of the interlocutory appeals previously reviewed by the Board; an issue which, we believe, goes beyond the limits of that which can properly be entertained in an interlocutory appeal.

Pursuant to a request of petitioners, Judge McDonald has certified the following question to the Board:

Is it an abuse of discretion for an Administrative Law Judge in an evidentiary hearing to rule that a lawyer whose qualifications were presented to the ALJ as reflected in the accompanying transcript may not testify as an expert to the issues detailed on the attached Exhibits A and B, on the grounds that the proffered testimony would invade the province of the judge and that the potential prejudice and waste of time outweigh any potential assistance to the tribunal from such testimony, unless and until it is shown that other avenues such as briefs, oral argument, and examination of departmental personnel or other expert or lay witnesses will not allow appellants to adequately present their theory of the case through argument and relevant and material testimony.

As posed by Judge McDonald, the issue presented for our review does not involve a controlling question of law. On the contrary, it clearly constitutes a request that this Board provide an interlocutory review of a purely evidentiary determination by the presiding Judge. This we cannot do.

Admittedly, the Board has occasionally entertained petitions for interlocutory review which arose out of evidentiary rulings by Administrative Law Judges. But, unlike the instant appeal, these cases either involved interpretation of a prior order of this Board remanding the case for a hearing as in United States v. Pittsburgh Pacific Co., 68 IBLA 342, 89 I.D. 586 (1982), or involved evidentiary rulings which necessarily implicated a controlling issue of law as in Muskingum Mining Co. v. OSM, 113 IBLA 352 (1990), wherein the Board affirmed a decision of Judge McGuire that the doctrine of collateral estoppel did not bar

consideration of whether a violation asserted by the Office of Surface Mining Reclamation and Enforcement caused damage to a third-party's property. The instant matter, however, clearly involves not a controlling question of law but rather a requested determination whether an evidentiary ruling by an Administrative Law Judge is in accord with prevailing precedent. While the challenged ruling might well be subject to review by this Board in the context of an appeal from a final determination of an Administrative Law Judge (see Midland Livestock Co., 10 IBLA 389, 401 n.7 (1973)), it is not the type of question amenable to interlocutory determinations by the Board.

A review of the transcript relating to this question, however, indicates that Judge McDonald may have been misled in her certification of this question by a statement appearing in a recent Board decision. In Wilcox v. BLM, 134 IBLA 57 (1995), this Board raised the specter that a failure to seek interlocutory review of evidentiary rulings rendered by an Administrative Law Judge might preclude the objecting party from pursuing the issue before the Board. Therein, we stated that "where a party challenging the admissibility of evidence fails to avail itself of the opportunity to obtain interlocutory review of that question, the Board will normally not entertain a similar challenge to the admission of evidence in the course of its consideration of an appeal." Further reflection convinces us that this statement was clearly wrong and we take this opportunity to expressly repudiate it. <sup>2/</sup>

We believe that the correct procedure requires any party objecting to either the admission or exclusion of evidence at a hearing to place that objection on the record at the proper time and, if the ruling is to exclude evidence, to make an offer of proof sufficient to clarify the substance of the excluded evidence so that the presiding judge and, should an appeal subsequently arise, the Board can readily discern both the relevance and materiality of the proffered material. The hearing, however, must proceed uninterrupted by attempts to obtain immediate review of the challenged ruling.

It may be that, by the time the hearing has reached its conclusion, problems which loomed large in the minds of counsel have diminished in their magnitude to mere inconveniences. In such a situation, all of the parties, as well as this Board, will be spared an expenditure of time and effort which would ultimately be seen as unnecessary. On the other hand,

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<sup>2/</sup> We note that the decision in Wilcox cited this Board's decision in United States v. Feezor, 130 IBLA 146, 188-89 (1994), as supporting its position. In point of fact, however, while Feezor involved a challenge to the admissibility of evidence, the controversy in that case arose out of an assertion that the evidence proffered went beyond the scope of the issues remanded by the Board for further hearing. As such, this challenge was clearly one which could have been examined in an interlocutory appeal. See United States v. Pittsburgh Pacific Co., *supra*.

if, at the end of the hearing and after the rendition of the Administrative Law Judge's decision, counsel remain convinced that the evidentiary rulings have unfairly tainted the record developed, such matters will have been preserved for review by the Board in the context of a direct appeal. This would allow the Board to render a decision based on its view not only of whether the evidentiary determination of the Administrative Law Judge was in error but whether this error had any causal relationship to the ultimate determinations made. While this approach may, in an occasional case, necessitate the holding of a further hearing, it will also limit the disruptions to a significantly fewer number of cases than a procedure which allowed immediate recourse to the Board whenever a party felt aggrieved by an evidentiary ruling of an Administrative Law Judge.

In light of the foregoing, we must decline to accept the petition for interlocutory review, without expressing, in any way, an opinion as to the correctness of the ruling challenged herein.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the petition seeking permission to file an interlocutory appeal is denied.

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James L. Burski  
Administrative Judge

I concur:

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Franklin D. Amess  
Administrative Judge