

DEAN STATON ET AL.

IBLA 93-239

Decided July 25, 1996

Appeal from a decision of the Montana State Office, Bureau of Land Management, declaring three mining claims null and void ab initio. MTMMC 192579-MTMMC 192581.

Affirmed.

1. Administrative Authority: Estoppel—Estoppel

One precondition for the invocation of estoppel against the Government in matters concerning the public lands is the existence of affirmative misconduct on the part of the Government. For a misrepresentation to be affirmative misconduct, it must be in the form of a crucial misstatement in an official written decision.

2. Exchanges of Land: Forest Exchanges—Mining Claims: Lands Subject to

a notice of intent of 36 CFR 2202.1(b) (1993), the filing of forest exchange with the authorized officer and the notation of such proposed exchange on the public land records segregated the National Forest System lands included in the proposed exchange from appropriation, location, or entry under the general mining laws for 2 years. Mining claims located on these lands while the segregative effect is operative are null and void ab initio.

APPEARANCES: Dean Staton, Doris Sharkey, and Dan Murray, Anaconda, Montana, pro sese.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

Dean Staton, Doris Sharkey, and Dan Murray have appealed from a decision of the Montana State Office, Bureau of Land Management (BLM), dated February 1, 1993, which declared the Little Dandy 1-A, 1-B, and 1-C mining claims (MTMMC 192579-MTMMC 192581) null and void ab initio, on the grounds that the claims were located on lands segregated from location under the general mining laws. The claims are situated in the SE¹/₄ sec. 14, T. 5 N., R. 13 W., Principal Meridian, Deer Lodge, Montana.

The record before the Board indicates that, on August 12, 1991, the Forest Service informed BLM that Federal Land Exchange Northwest, Inc., had proposed a land exchange of certain lands within the Beaverhead and Deerlodge National Forests, including sec. 14, T. 5 N., R. 13 W. BLM's decision described the consequences of this filing by quoting from 43 CFR 2202.1(b) (1993), which provided, in relevant part:

The filing of a notice of an offer for forest exchange with the authorized officer and the notation of such proposed exchange on the public land records shall segregate the National Forest System lands included in the proposed exchange from appropriation, location or entry under the general mining laws but not from the applicability of those public land laws governing the use of the National Forest System under leases[,] license or permit, or governing the disposal of mineral or vegetative resources, other than under the general mining laws.

This segregation caused BLM to conclude that each of appellants' three claims was located on land not open to location and was, therefore, null and void ab initio.

In their statement of reasons for appeal (SOR), appellants aver that on June 15, 1992, prior to locating their claims, they inquired of BLM's Butte District Office whether the lands in the SE $\frac{1}{4}$ sec. 14 were open to mineral entry. As they relate the conversation, the District Office originally informed them that it would be necessary to contact the Montana State Office to ascertain the land status and suggested that appellants call back in 2 hours. Appellants note that when they did call back later that day, they were advised by BLM that the lands were open to mineral entry. Appellants relate that they then went to the local court house and recorded the claims (SOR at 1).

Appellants note that, within 90 days, after having spent several days on the claims laying out fluorescent tape and aluminum stakes in a grid in preparation for a magnetometer survey, they recorded the claim with BLM. Shortly thereafter, they were informed by BLM that the land was not open to mineral entry. Appellants argue that BLM's decision is unjust because they "went the extra mile" to make sure that the lands were open to entry and did everything from their end to make sure that the claims were valid. *Id.*

[1] The gravamen of appellants' complaint appears to be grounded in the assertion that BLM should be estopped to deny the past representations it allegedly made to appellants regarding the availability of the subject lands for mineral location. Unfortunately for appellants, we cannot agree. The Board has well-established rules governing consideration of estoppel questions. These rules were summarized in Ptarmigan Co., 91 IBLA 113, 117 (1986), aff'd sub nom. Bolt v. United States, 944 F.2d 603 (9th Cir. 1991):

First, we have adopted the elements of estoppel described by the Ninth Circuit Court of Appeals in United States v. Georgia-Pacific Co., 421 F.2d 92 (9th Cir. 1970):

Four elements must be present to establish the defense of estoppel: (1) The party to ~~the estoppel must be ignorant of the true facts; (2) the latter must be ignorant of the true facts; and (3) the latter must be ignorant of the true facts; and (4) he must rely on the former's conduct to his injury.~~

Id. at 96 (quoting Hampton v. Paramount Pictures Corp., 279 F.2d 100, 104 (9th Cir. 1960)). See State of Alaska, 46 IBLA 12, 21 (1980); Harry E. Reeves, 31 IBLA 242, 267 (1977). Second, we have adopted the rule of numerous an extraordinary remedy, especially as it relates to the public lands. Harold E. Woods, 61 IBLA 359, 369 (1982); State of Alaska, *supra*. Third, estoppel against the government in matters concerning public lands must be based on affirmative misconduct, such as misrepresentation or concealment of material facts. United States v. Ruby Co., 588 F.2d 697, 703 (9th Cir. 1978); D.F. Colson, 63 IBLA 121 (1982); Arpee Jones, 61 IBLA 149 (1982). Finally, we have noted that while estoppel may lie where reliance on Governmental statements deprived an individual of a right which he could have acquired, estoppel does not lie where the effect of such action would be to grant an individual a right not authorized by law. See Edward L. Ellis, 42 IBLA 66 (1979).

A review of the record shows clearly that appellants cannot establish the necessary elements to invoke estoppel with respect to the instant appeal. There seems no room to doubt that appellants are steadfast in the belief that the Butte District Office had given them a green light to locate the claims at issue. However, in James W. Bowling, 129 IBLA 52 (1994), the Board reiterated the requirement that, for a misrepresentation to be affirmative misconduct sufficient to justify invocation of estoppel, it must be in the form of a crucial misstatement in an official written decision. See also Peak River Expeditions (On Reconsideration), 98 IBLA 13, 15-16 (1987); Steve E. Cate, 97 IBLA 27, 32 (1987); Marathon Oil Co., 16 IBLA 298, 317, 81 I.D. 447, 455 (1974).

The reason that both the Department and the Courts have required that estoppel claims generally be based on written documents is simple. Oral advice, by its nature, provides an unstable foundation on which to base future actions. This is a function not merely of the very real possibility of misunderstandings between the participants but because, as the Supreme Court noted in Heckler v. Community Health Services, 467 U.S. 51, 65 (1984), "[w]ritten advice, like a written judicial opinion, requires its author to reflect about the nature of the advice that is given to the citizen, and subject that advice to the possibility of review, criticism

and reexamination." In this case, the absence of a written assurance that the specific lands which appellants desired to claim were open to such appropriation is sufficient, without more, to require rejection of any estoppel claim.

[2] A further reason exists which compels rejection of appellants' argument. As set forth above, estoppel will not lie when the effect of such action would be to grant an individual a right not authorized by law. The case law is clear that mining claims located on lands not open to appropriation are null and void ab initio (see, e.g., Shiny Rock Mining Corp. v. United States, 825 F.2d 216, 219 (9th Cir. 1987); United States v. Smith Christian Mining Enterprises, Inc., 537 F. Supp. 57, 61 (D. Or. 1981)). Lands within an exchange proposal are segregated from location upon the filing of a notice of a forest exchange offer and the notation of such proposed exchange on the public land records. ^{1/} See John & Maureen Watson, 113 IBLA 235 (1990); Oscar E. Harding, 110 IBLA 117 (1989); Walter MacEwen, 87 IBLA 210 (1985).

Examination of BLM's master title plat for T. 5 N., R. 13 W. indicates that the proposed exchange was noted on the public land records prior to location of appellants' claims. A notation within sec. 14 on a plat dated May 4, 1992, reads "MTM 80372 FX Apln NOM." The abbreviation "FX" stands for Forest Exchange and "NOM" is an abbreviation for Not Open to Mining. The historical index for T. 5 N., R. 13 W. also contains a notation in sec. 14 which reads "Segr from Min Loc by FX Apln." Therefore, as of May 4, 1992, at very latest, the lands occupied by appellants' claims were segregated from location under the general mining laws. This notation, under the provisions of the law and the regulations, served to close the lands involved herein to mineral entry. To allow appellants to invoke estoppel in the instant case would be, in effect, to afford them a right to make a mineral entry not otherwise available. This, we cannot do.

Appellants make other arguments on appeal in support of the validity of their claims, noting that the lands have been in mineral entry for 45 years. Appellants also urge that BLM not discriminate in removing

^{1/} The historical index for T. 5 N., R. 13 W. noted that, consistent with the provisions of section 204(b) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1714(b) (1994), the segregative effect of the Forest Service application would not exceed 2 years. Subsequent notations, however, indicate that another Forest Service application for the lands involved herein was filed on Aug. 3, 1993, and a third application was filed on Aug. 3, 1995. This last application was apparently filed under the provisions of sections 3 and 9 of the Federal Land Exchange Facilitation Act of 1988, 102 Stat. 1086, 1087, 1092, as amended, 43 U.S.C. § 1716 (1994). As we recently noted in Washington Prospectors Mining Association, 136 IBLA 128 (1996), that Act provides for a 5-year period of segregation for Forest Service exchanges. In any event, the lands embraced by appellants' claims continue to be unavailable for mineral entry at the present time.

their claims from mineral entry. Neither of these arguments nor others in their SOR set forth a justifiable basis for reversing BLM's decision of February 1, 1993, insofar as these claims are concerned. We must conclude that BLM's decision declaring appellants' claims null and void ab initio was proper.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Montana State Office is affirmed.

James L. Burski
Administrative Judge

I concur.

David L. Hughes
Administrative Judge

