

Editor's note: Errata dated June 16, 1975 -- See 19 IBLA 378A; 82 I.D. 146; Appealed -- aff'd in part, rev'd in part, Civ. No. 1-75-74 (D. Idaho Dec. 20, 1976), both parties appealed; rev'd, (aff'd IBLA), No. 77-1914 and 77-1948 (9th Cir. Nov. 16, 1978) rehearing denied (April 9, 1979) 593 F.2d 851 cert. denied, S.Ct. No. 79-7; 100 S.Ct. 133, 444 U.S. 863 (1979), rehearing denied, 459 U.S. 1048 (1982)

UNITED STATES

v.

G. PATRICK MORRIS ET AL.

IBLA 71-209

Decided April 7, 1975

Appeal from a decision of Administrative Law Judge John R. Rampton, Jr., dismissing contest complaints against twelve desert land entries and refusing to order their cancellation.

Reversed.

1. Desert Land Entry: Generally

An arrangement by which an entity obtains mortgages on desert land entries and also obtains leases of a possible twelve year duration on the desert land entries, the result of which is the vesting of effective control of the entries in such

entity, constitutes a holding within the purview of section 7 of the Act of March 3, 1877, as amended.

2. Desert Land Entry: Generally -- Words and Phrases

"Hold." Any person or entity which has acquired actual possession and the right thereof to more than 320 acres of desert lands "holds" such acreage within the meaning of the prohibition of section 7 of the Act of March 3, 1877, as amended.

3. Desert Land Entry: Generally -- Words and Phrases

"Otherwise." As used in section 7 of the Act of March 3, 1877, as amended, "no person or association of persons shall hold by assignment or otherwise * * *", "otherwise" is not limited to other means equivalent to assignment but rather embraces all mechanisms whereby control of and benefit from an entry or entries are accumulated and transferred.

4. Desert Land Entry: Generally -- Desert Land Entry: Cancellation

Violation of the prohibition against holding an excess of 320 acres constitutes a failure to comply with the requirements of law and such entries are properly canceled.

5. Desert Land Entry: Generally -- Desert Land Entry: Cancellation

Estoppel will not lie against the Government where there is no showing that the parties to illegal agreements relied in any way on the statements or acts of Government officials.

APPEARANCES: William F. Ringert, Esq., Anderson, Kaufman, Anderson & Ringert, Boise, Idaho, for appellees; Riley C. Nichols, Esq., Office of the Solicitor, United States Department of the Interior, Boise, Idaho, for appellant.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

The Government appeals from the decision of Administrative Law Judge John R. Rampton, Jr., dated January 29, 1971, dismissing contests

against twelve desert land entries and refusing to order the cancellation thereof. ^{1/} The contests had been initiated in May of 1966 by the Idaho Land Office Manager, Bureau of Land Management. The contest complaints alleged that:

(a) Application for entry was not made in good faith in that (1) the contestee had no intent to reclaim, irrigate, and cultivate the land for his own use and benefit as required by section 1 of the Act of March 3, 1877, 19 Stat. 377, 43 U.S.C. sec. 321, and (2) the contestee, or others acting on his behalf, prepared and filed documents with the land office which concealed and falsified relevant facts and arrangements.

(b) The contestee entered into arrangements whereby his entry was assigned to and for the benefit of a corporation in violation of section 2 of the Act of March 28, 1908, 35 Stat. 52, 43 U.S.C. sec. 324.

(c) The contestee entered into arrangements whereby others held his entry, together with other desert entry land, in an aggregate of more than 320 acres in violation of section 2 of the Act of March 3, 1891, 26 Stat. 1096, 43 U.S.C. sec. 329.

(d) The contestee, or others on his behalf, filed proof papers which (1) concealed that the proof taking, the work on the entry land, and the application for entry, were for the benefit of others than the contestee, and (2) failed to show the reclamation, irrigation, and cultivation of the contestee's entry was performed as required by the Act of March 3, 1877 as amended, 19 Stat. 377, 43 U.S.C. secs. 321 through 329.

^{1/} The entries involved in this appeal are: G. Patrick Morris, I-013820; Joan E. Roth, I-013905; Elise L. Neeley, I-013906; Lyle D. Roth, I-013907; Vera M. Noble, I-014128; George R. Baltzor, I-014129; John E. Morris, I-014130; Juanita M. Morris, I-014249; Nellie Mae Morris, I-014250; Milo Axelsen, I-014251; Peggy Axelsen, I-014252.

(e) The contestee failed to make the expenditures for the reclamation, irrigation, and cultivation of the entry lands as required by section 2 of the Act of March 3, 1891, 26 Stat. 1096, 43 U.S.C. sec. 328.

(f) The contestee did not reclaim, irrigate, and cultivate the entry land as required by section 2 of the Act of March 3, 1891, 26 Stat. 1096, 43 U.S.C. secs. 328, 329.

Timely answers were filed denying the allegations.

Extensive hearings were held commencing on June 26, 1967, and terminating on August 1, 1968, aggregating 38 days of testimony. Both parties thereupon submitted lengthy and detailed briefs. The Judge in his decision found for the contestees on every allegation in the Government's complaint. Specifically, he found that the entries had been made in good faith (Decision at 15-18 [hereinafter "Dec."]), the entries had not been assigned to a corporation nor did any individual "hold" more than 320 acres of land (Dec. at 18-26), the proof papers did not conceal relevant facts (Dec. at 26-29) and the entrymen made the necessary expenditures in reclaiming, irrigating and cultivating the lands (Dec. at 29-33). The Government timely filed a notice of appeal.

After careful consideration we have reached the conclusion that the Judge's decision is in error and must be reversed. A lengthy recitation of the factual disputes will not be necessary

since the facts upon which our determination is based are not controverted. Our specific area of concern relates to the question of whether Sailor Creek Water Company held in excess of 320 acres of desert land in contravention of section 7 of the Act of March 3, 1877, as amended, 26 Stat. 1096, 43 U.S.C. § 329 (1970).

Prior to entry each entryman acquired a permit to appropriate the waters of the State of Idaho. 2/ All the permits, with one exception, were then assigned to the Sailor Creek Land and Water Company of Nampa, Idaho, in June of 1963. 3/ In August of 1963, the Sailor Creek Land and Water Company assigned all of the permits to the Sailor Creek Water Company of Twin Falls, Idaho. The Sailor Creek Water Company was the result of a joint venture entered into on July 5, 1963, by Hiller Engineering Corporation and Farmland-Idaho, Inc., both of which were subsidiaries of Hale Brothers Associates. Subsequently Farmland-Idaho, Inc., changed its name to Farm Development Corporation [FDC]. In September of 1964 the joint venture was terminated with Hiller Engineering transferring its shares in the Sailor

2/ It should be noted that Milo Axelsen, Peggy Axelsen and Juanita Morris did not acquire a water permit for their lands. A permit for the lands embraced in Milo Axelsen's entry had originally been obtained by John E. Noble, Permit No. 31119. A permit for the lands embraced in Peggy Axelsen's entry had originally been obtained by Lucy M. Noble, Permit No. 31118. Permits for the lands embraced in Juanita Morris' entry had originally been obtained by Keith Taylor, Permit No. 31122, and Della Jane Taylor, Permit No. 31123. All four permits were assigned to Sailor Creek Land and Water Company of Nampa, Idaho, and eventually to the Sailor Creek Water Company of Twin Falls, Idaho (Ex. G-141; G-142; G-80 file 1 at 266-77).

3/ Elise Neeley's Permit No. 30983 was not assigned to the Sailor Creek Land and Water Company in June. Rather it was directly assigned to the Sailor Creek Water Company on July 23, 1963 (Ex. G-129).

Creek Water Company to FDC (Ex. C-CI, C-CJ). FDC, for reasons of convenience, continued to do business under the name of Sailor Creek Water Company (Prehearing Tr. at 26-27).

On August 7 and 9, 1963, the entrymen entered into Water Rights Contracts with the Sailor Creek Water Company (See e.g., Ex. G-13). In these agreements Sailor Creek Water Company agreed to construct an irrigation system and supply the entrymen with water at the rate of \$9.31 per acre foot. The entrymen agreed "to farm and irrigate [their entries] to the fullest extent of the acreage thereof as is consonant with good husbandry and farming practice . . ." (See e.g., Ex. G-13 at 8-fa.) The total purchase price of the water right varied according to the acreage involved in the individual entries. Initial payment was to be made within thirty days of the allowance of the entry, with subsequent annual payments over the succeeding nineteen years. ^{4/}

At the same time the entrymen and Sailor Creek Water Company entered into a mortgage of their entries for the sum of the purchase price of the water right, less the initial payment. (See e.g., Ex. A of Ex. G-13 [hereinafter Mortgage].) Among the provisions of

^{4/} The total amount varied from \$59,648 for 320 acres to \$48,464 for 280 acres. (See generally Ex. G-149, Doc. 0).

the agreement was a requirement that the mortgagors (the entrymen) pay all taxes and assessments (See e.g., Mortgage, at 2-fa), and authorization for the mortgagee to enter upon and take possession of the entry, and receive all rents which were overdue in the case of any default on the agreement. (See e.g., Mortgage, at 3-fa.) Finally, each mortgage contained the following provision:

That the mortgagee, by accepting this mortgage, agrees that the obligation, obligations or debts secured by this mortgage shall be fully satisfied upon receipt of the proceeds of any sale had for the foreclosure of this mortgage and that such acceptance shall constitute a waiver of rights to any deficiency which may remain after the application of the proceeds of such sale.

(See e.g., Mortgage, at 4-fa.)

Copies of each of these mortgages were filed in the Land Office on March 27, 1964.

On September 23, 1963, eleven of the entrymen leased their entries to the twelfth entryman, G. Patrick Morris, and to Allen T. Noble. (See e.g., Ex. G-2, Doc. 34.) Each lease was for a term of two years with the right of two subsequent five year renewals. Section 3 of the lease provided that the lessors (the entrymen) pay all ad valorem taxes assessed upon the real property and comply with all of the terms, including payment, of the Water Rights Contract. All costs of planting were to be borne by the lessees. Similarly, the lessees exercised total control over the

selection, growing and harvesting of crops. Section 9 of the lease agreement provided, inter alia, that:

[t]he parties specifically agree that the lessees shall have the right to withhold from the annual cash rental payable to the lessor for the then current calendar year an amount equal to the installment of purchase price and interest due and payable from the lessor and spouse to the said Sailor Creek Water Company during such current calendar year under the terms of the aforesaid contract, and the lessees shall deliver any amount so withheld to the said Sailor Creek Water Company to the credit of the lessor and spouse in payment of the then current annual installment of purchase price and interest due from the lessor and spouse to Sailor Creek Water Company under the aforesaid contract, and such delivery shall constitute payment of the applicable annual cash rental to the extent of the amount so delivered.

(See e.g., Ex. G-2, Doc. 34 at 6-7.)

Lessees, of course, retained all revenue generated from the farming operations. The lessees were obligated to pay the lessors an annual rental sufficient to cover their required payments under the Water Rights Contract, foreseeable ad valorem taxes, and income taxes on the principal reductions of their outstanding debt to Sailor Creek Water Company. (See Tr. XXXVIII at 5855; Ex. G-149, Doc. A, A-15 at 6-7.) 5/

5/ The Administrative Law Judge in his decision, stated that the cash rental was "\$25 per irrigable acre for two years with option for two additional five-year periods of \$22.50 and \$30 per acre per year." (Dec. at 10.) The Judge apparently relied on a memorandum written by B. G. Miller, an officer of Hale Brothers Associates, which discussed a sliding scale of payments for the renewal years (Ex. G-149, Doc. A, A-15 at 6-7.) That memorandum, however, employed the sum of \$27.50 instead of \$22.50. In any case, the actual leases specifically provided that the same rent would be paid for renewal years as that required for the original two year terms. (See e.g., Ex. G-2, Doc. 34 at 4.)

On January 1, 1964, G. Patrick Morris leased his entry to the Sailor Creek Water Company (G-1, Doc. 33). On the same day, Allen T. Noble and G. Patrick Morris subleased the other entries to the Sailor Creek Water Company. Both the lease and the sublease were for a term of one year commencing January 1, 1964 (G-150, Doc. X, X-9). Noble and Morris were to receive one-third of the net profit derived from the sale of all crops grown and harvested. The Sailor Creek Water Company agreed to make all payments due under the original leases, and assumed all other obligations under the lease terms.

6/

On September 30, 1964, Morris assigned his undivided one-half interest in the other entrymen's leases to the Sailor Creek Water Company for the sum of \$134,300, as well as an option to purchase two parcels of land (Ex. G-150, Doc. X, X-5). Simultaneous thereto, as security for payment, Sailor Creek placed in escrow a reassignment of the leases back to Morris. On February 18, 1965, Noble and the Sailor Creek Water Company reduced to writing an agreement made on October 22, 1964, in which Noble assigned to Sailor Creek Water Company his undivided one-half interest in the leases for \$134,300 and an option to purchase two parcels of land (Ex. G-150, Doc. R, R-87).

6/ Through inadvertence the original sublease agreement embraced Morris' entry on S 1/2 sec. 8, T. 6 S., R. 9 E., B.M., which had been leased to Sailor Creek Water Company on Sept. 30, 1963. Therefore, on August 14, 1964, the sublease was amended to delete those lands. (Ex. G-150, Doc. X, X-8.) Three days later Morris assigned one-half of the rental owing on his lease to Allen T. Noble. (Ex. G-150, Doc. X, X-7.)

On the same date that Morris assigned his one-half interest in the other entrymen's leases to the Sailor Creek Water Company, he also leased his own entry to the company for a one-year term with the right of two successive five year renewals (Ex. G-150, Doc. X, X-3).

Thus, by 1965 the Sailor Creek Water Company had a mortgage on all the entries, had leases with an eleven year possible life, had absolute authority to determine what would or would not be grown, oversaw all of the planting and harvesting operations, and retained all profits derived from these operations. ^{7/}

[1-3] Section 7 of the Act of March 3, 1877, as amended, 26 Stat. 1096, 43 U.S.C. § 329 (1970), provides, in relevant part, that:

* * * no person or association of persons shall hold by assignment or otherwise prior to the issue of patent, more than three hundred and twenty acres of such arid or desert land * * *.

^{7/} It should also be noted that on October 4, 1963, Peggy Axelsen entered into a ninety-nine year lease with the Sailor Creek Water Company for the NW 1/4 SW 1/4 sec. 2, T. 6 S., R. 9 E., B.M. for \$25 per year. (Ex. G-12, Doc. 37.) On December 6, 1963, a similar lease was entered into for the SE 1/4 SW 1/4 sec. 2, T. 6 S., R. 9 E., B.M. (Ex. G-12, Doc. 38). As the Judge in his decision noted "the leases to Morris and Noble were still in effect so the 99-year leases never became effective and were cancelled in 1967." (Dec. at 11.) Cancellation, however, did not occur until after the initiation of contest proceedings.

The operative phrase of this section is "hold by assignment or otherwise." The Government cites the Departmental decision in United States v. Shearman [Indian Hill], 73 I.D. 386, 426 (1966) and the Solicitor's Opinion M-36680, Idaho Desert Land Entries - Indian Hill Group, 72 I.D. 181 (1965), as support for its contention that appellants' actions have resulted in a violation of the proscriptions of the Act. The Judge ruled that the Sailor Creek Water Company, being in the position of a tenant, had not violated the prohibition of the Act.

There are three separate words the interplay of which must be analyzed to judge the correctness of the decision below: 1) "hold"; 2) "assignment" and 3) "otherwise."

The word "hold" has no fixed definition. Rather, its meaning can only be determined from the context in which it occurs with due regard for the legislative purpose animating its usage. See United States v. Shearman, supra at 427; Navajo Tribe of Indians v. State of Utah, 12 IBLA 1, 135-36, 80 I.D. 441, 507 (1973).

BLACK'S LAW DICTIONARY (4th ed. 1951) defines "hold" as follows:

1. To possess in virtue of a lawful title; * * * common in grants, "to have and to hold," * * *

2. To be the grantee or tenant of another; to take or have an estate from another. Properly, to have an estate on condition of paying rent, or performing service * * *

Id. at 864

The Solicitor's Opinion, supra, discussed the scope of the word "hold" as it appears in the statute and concluded that two elements must be present: (1) actual possession and (2) the right of actual possession. Under the leases involved herein, the Sailor Creek Water Company clearly had a right of actual possession. Indeed, section 1 of the Lease Agreement, relating to the effective commencement of the leasing period, provides a mechanism for "the lessees to enter into possession of said premises and produce the normal crops which the lessees intend to grow on said premises . . ." (See e.g. Ex. G-2, Doc. 34 at 3.) The Sailor Creek Water Company pursuant thereto entered into actual possession and proceeded to grow crops on the lands embraced by the entries.

Appellees, in their briefs to the Administrative Law Judge [Brief of Contestees and Intervenor] and to this Board [Appellees' Answer], argue at length that the Solicitor's Opinion, supra, is unsupported in either the case law or a careful analysis of the purposes and intent of the Desert Land Act. Their reading of the statute would limit the sweep of the word "hold" to ownership and

disregard any interpretation which would embrace a leasehold interest.

Appellees contend that there is support for such a construction in the Coal Land Act, March 3, 1873, 17 Stat. 607, 608, 30 U.S.C. §§ 71-74 (1970), in the limitation, under the reclamation laws, of the amount of land assignable - one farm unit (i.e., up to 160 acres) - prior to final payment of all charges for the land, § 13 of the Act of August 13, 1914, 38 Stat. 690, 43 U.S.C. § 443 (1970), in the acreage limitations found in § 3 of the Act of August 9, 1912, 37 Stat. 266, 43 U.S.C. § 544 (1970), and in the judicial and Departmental interpretations thereof.

We are not persuaded by the statutory comparisons advanced by appellees. Section 4 of the Coal Land Act provides, in relevant part, that:

The three preceeding sections shall be held to authorize only one entry by the same person or association of persons; and no association of persons any member of which shall have taken the benefit of such sections, either as an individual or as a member of any other association, shall enter or hold any other lands under the provisions thereof; and no member of any association which shall have taken the benefit of such sections shall enter or hold any other lands under their provisions; * * * (Emphasis added).

30 U.S.C. § 74 (1970).

The cases which appellees cited to the Judge below, in reference to the Coal Land Act, see Brief of Contestees and Intervenor at 190-93, suffer from two infirmities. First, the cases uniformly involve acquisition or attempted acquisition of title. Thus, the language of the decisions is naturally couched in phrases denoting acquisition. See e.g., United States v. Colorado Anthracite Co., 225 U.S. 219 (1912); United States v. Keitel, 211 U.S. 370, 388 (1908). But it does not follow that acquisition of legal title from the Government was the only thing prohibited by the section.

Secondly, the Coal Land Act was not a settlement Act but one aimed at the development of mineral resources. In contradistinction, the Desert Land Act, while obviously envisaging development of desert lands, was designed primarily to provide a mechanism by which Government land could be obtained and settled by American citizens. Thus, the Desert Land Act has a dual focus and even assuming a restrictive interpretation of "hold" under the Coal Land Act it would be improper to apply such a limiting definition to the Desert Land Act merely because such a reading has a validity under an unrelated Act.

The two sections of the reclamation laws are equally inapplicable herein. Section 13 of the Act of August 13, 1914, provides that:

[n]o person shall hold by assignment more than one farm unit prior to final payment of all charges for the land held by him subject to the reclamation law, except operation and maintenance charges not then due.

43 U.S.C. § 443 (1970).

Section 3 of the Act of August 9, 1912, provides, inter alia, that:

[n]o person shall at any one time or in any manner, except as hereinafter otherwise provided, acquire, own, or hold irrigable land for which entry or water-right application shall have been made * * * before final payment in full of all installments of building and betterment charges shall have been made on account of such land in excess of one farm unit * * *

43 U.S.C. § 544 (1970).

A number of points must be made as regards these two sections. First, appellees admit that there are no judicial or departmental cases affirmatively construing these two provisions as not encompassing leases. Appellees' Answer at 185-88. Their argument is based on silence, on failure to act against an alleged "matter of common knowledge within the Department of the Interior that there are numerous instances of single operators leasing and farming areas within federal reclamation projects * * * far in excess of one farm unit." Appellee's Answer at 185. Analysis of the concerns animating the limitations, however, shows that failure to proceed against lessees under the above quoted sections of the reclamation laws was the result of factors not present in the desert land laws.

One of the main purposes of the Reclamation Act was to break up existing large land holdings and prevent the establishment of future large holdings and thus assure that the benefits of the Act inured to the general public and not to a few wealthy landowners. See generally Proposed Repayment Contracts - Kings and Kern River Projects, 68 I.D. 372 (1961). They were both anti-speculative and settlement-oriented in general thrust. The implementation of the Act did not quiet, but rather exacerbated fears that large landowners were becoming the beneficiaries of reclamation activities to the detriment of the general American populace. The problem which continued to plague the reclamation laws was that of a large landowner, who would merely maintain his excess holdings until the cheaper lands around his holdings had been taken by earlier settlers. These excess lands did not receive water so long as the large landowners held them, but once sold to a qualified applicant the lands would become eligible. Thus, the large landowners struck upon the simple device of retaining excess holdings until the land values had risen, due to the potential availability of water, and then selling the lands. The profits intended by Congress to flow to the individual settlers were, therefore, going instead to large landowners. By a series of amendments from 1912 to 1926 various stratagems were devised to require large landowners to divest themselves of what was seen as excessive land holdings.

The Acts of August 13, 1914, and May 25, 1926, were direct outgrowths of attempts to rectify the situation. See generally Kings and Kern River Projects, supra, at 384-96. The evils of leasing, when perceived at all, were seen in a context of large landowners leasing to tenants. It was not the lessee who was violating the intent of the Act but the subsisting ownership by which the landowner acquired the benefits of the reclamation law. As was noted by a special advisory committee in its report dated April 10, 1924:

The tenant is not desirable on the Federal irrigation projects, for the reason that these projects were authorized with the home-building idea as the central consideration. It was hoped that those who entered upon the projects would do so with the purpose of making permanent homes for themselves and their families. Under a system of tenantry, the farm merely becomes a long-distance investment, the profits from which, if any, are used to maintain the family in the city or at least at considerable distance from the farm.

S. Doc. 92, 68th Cong., 1st Sess. at 133.

Little, if any, weight can be given the fact that the Department has not historically proceeded against tenants in reclamation lands for violating the "holding" requirement specified in the statute. Enforcement of the reclamation laws has always been directed at assuring that the benefits of reclamation inured to those whom Congress sought

to aid. Tenants were not seen as reaping such benefits and it is understandable that no actions against them were undertaken. 8/

Appellees also contend that past Departmental and judicial interpretations of the Desert Land Act militate against acceptance of the view that leasing is within the ambit of the proscription against "holding." Great reliance is placed by both appellees and the Administrative Law Judge on Silsbee Town Company, 34 L.D. 430 (1906). That case arose prior to the prohibition of corporate entries codified in 43 U.S.C. § 324 (1970) and involved the authority of the Department to go behind the corporate structure of a corporation seeking to make a desert land entry in order to examine the individual qualifications of the individuals composing it. In the course of an opinion affirming the authority of the Department to pierce the corporate veil and examine the individual makeup of corporations the decision stated:

[t]he language quoted [43 U.S.C. § 329] clearly discloses the legislative intent that no person or association of persons shall obtain the benefit incident to the acquisition of title to more than 320 acres of land under the desert-land law, and it was not the intention to permit a person to exercise directly, in an

8/ In a subsequent submission, received September 19, 1974, appellees cited Blight's Lessee v. Rochester, 21 U.S. (7 Wheat.) 535 (1822) and Rector v. Gibbon, 111 U.S. 276 (1884). We have examined those two cases but find them unpersuasive on the issues before us.

individual capacity, the benefit conferred, and in addition, obtain a like benefit, by the indirect exercise of the same right through the instrumentality of a legal fiction * * *. (Emphasis added.)

Emphasis is placed on the use of the phrase "acquisition of title." Inasmuch as the Silsbee case involved the making of a corporate entry it is manifestly logical that the decision is couched in terms denoting ownership. Once again we do not feel it proper to draw a negative inference from the fact that the decision referred only to the acquisition of title in discussing the "holding" proscription.

We stated, supra, that "hold" can only be correctly construed by reference to the context in which it appears with due regard for the legislative intent implicit in its utilization. Section 1 of the original Desert Land Act, Act of March 3, 1877, 19 Stat. 377, provided:

* * * no person shall be permitted to enter more than one tract of land and not to exceed six hundred and forty acres * * *

While the Act of August 30, 1890, 26 Stat. 391, reduced the amount of land available for individual entry to 320 acres, it had no effect on the essential prohibition. A consistent course of Departmental decisions prior to the enactment of the Act of March 3, 1891,

supra, had established the principle that the Congressional prohibition against entry in an excess of 640 acres could not be defeated by either an original entry or assignment of an entry. 9/ Thus, while the 1891 Act authorized assignments which had theretofore been prohibited, clear Departmental policy had already established limitations on assignments to the maximum authorized amount of one tract of land. See David B. Dole, 3 L.D. 214 (1884).

Adoption of appellees' interpretation would thus result in a finding that Congress, in enacting sec. 2 of the Act of March 3, 1891, had simply re-promulgated the prior existing law. Furthermore, if, as appellees contend, "assignment" had a fixed and established meaning as of 1891 (Brief of Contestees and Intervenor at 133-43)

9/ See Joab Lawrence, 2 L.D. 22 (1884); Peter French, 5 L.D. 19 (1886). The Department had originally held that desert land entries were assignable, but in 1880 reversed this holding and held that such entries were not assignable. S. W. Downey, 2 Copps (1882 Ed.) 1381 (April 15, 1880). The Department subsequently held that assignments made in reliance upon the initial erroneous interpretation would be recognized, but only to the extent of one tract of land, i.e., 640 acres. David B. Dole, 3 L.D. 214, 216 (1884). The Act of March 3, 1891, supra, effectively nullified the Department's interpretation of the 1877 Act as prohibiting all assignments. See Luther J. Prior, 32 L.D. 608 (1904).

It could, therefore, be argued that the 1891 Act far from expanding a holding prohibition beyond that embraced by "Assignment" was merely permitting actions formerly prohibited under the Act of March 3, 1877. Such an analysis ignores the fact that to the extent that the Department had allowed recognition to be given to assignments in the Dole case it had specifically held that no more than one tract of land might be taken by such assignment. "Assignment" was thus a known quantity and had Congress intended to limit the holding provision to assignments there would have been no necessity to add the phrase "or otherwise."

it is difficult to see why Congress did not simply state that "no person or association of persons shall hold by assignment prior to the issuance of patent, more than three hundred and twenty acres of such arid or desert land." The only ostensive reason which appellees' advance for the inclusion of the phrase "or otherwise," namely, "other means equivalent to assignment," implicitly rests upon an assumption that enforcement of the prohibition against assignments is limited to only those instances in which entrymen call their transactions "assignments." But the general rule has always been that "courts look beyond mere names and within to see the real nature of an agreement, and determine from all its provisions taken together, and not from the name that has been given to it by the parties or from some isolated provision, its legal character and effect * * *." United States v. Shearman, *supra* at 426, citing Arbuckle v. Gates, 95 Va. 802, 30 S.E. 496 (1898).

Finally, we believe that statutory analysis compels the conclusion that more than title transfer is prohibited by sec. 329. The entire proscription is against holding, prior to the issuance of patent, an excess of 320 acres. Since legal title remains in the United States until patent, limiting the prohibition to transfer of ownership would make the act an effective nullity. Rather we believe it covers situations involving agreements to transfer title once acquired as well

as arrangements which result in the accumulation or transfer of effective control of and benefit from land in excess of statutory restrictions prior to issuance of patent. See United States v. Shearman, supra at 428.

Turning to "assignment" we note that the Department in the Indian Hill case determined that: "[a]ssignment as used in [sec. 329] is, therefore, concluded to mean such interest or partial interest as will result in effective control of and benefit from the entry or entries." 73 I.D. at 428. The Ninth Circuit Court of Appeals in Reed v. Morton, 480 F.2d 634 (1973), cert. denied, 414 U.S. 1064, affirmed the finding that the actions of the entrymen therein constituted prohibited assignments. Heavy emphasis, however, was placed upon the fact that "the entrymen understood . . . that they were transferring their interests to the developers for \$10 an acre, and that they did not regard themselves as having any interest in the land after this meeting." Id. at 640.

In the instant case the Administrative Law Judge found that:

None of the entrymen agreed to sell the land in their entries after patent. Nor does the record contain testimony or documentary evidence which would infer that any entryman had agreed to sell the land in his or her entry.

(Dec. at 23.)

Assuming, arguendo, the lack of an agreement to transfer the lands after issuance of patent it is unnecessary for us to decide whether these actions nevertheless effectively constitute an assignment. But see United States v. Alameda P. Law, 18 IBLA 249, 81 I.D. 794 (1974). The entire phrase is "assignment or otherwise." (Emphasis added.) Regardless of whatever technical argument can be mounted over the meaning of "assignment," we believe appellees must run afoul of the more embracing concept embodied in "otherwise."

Appellees argue strongly that the doctrine of ejusdem generis should be applied so as to limit the scope of "otherwise" to, "other means equivalent to assignment." Brief of Contestees and Intervenor at 200 g. Appellees' analysis suffers from two discrete infirmities.

First, the doctrine of ejusdem generis is not applicable. Shortly stated the rule provides that where words of general import follow words of specific and particular meaning, the general words are not extended to their widest limits but are rather limited in meaning to the general class of the words specifically mentioned. Thus, ejusdem generis is merely a narrower construct of the maxim noscitur a sociis, i.e., the meaning of the word may be known from accompanying words. But use of the word "otherwise" in the statute before us negates appellees' contention, since we are not faced with a succession of specific words but merely a single specific word. "Otherwise" by its nature implies a differentiation from words conjoined. Black's Law Dictionary, *supra*,

defines "otherwise" as "[i]n a different manner, in another way, or in other ways." Id. at 1253. See e.g. Dunham v. Omaha & Council Bluffs St. Ry. Co., 106 F.2d 1, 3 (2d Cir. 1939); Newport Air Park, Inc., v. United States, 293 F. Supp. 809, 811 (D. R.I. 1968). Appellees would invoke a doctrine of construction, of questionable utility in the instant case, to nullify the plain meaning of a simple word. But a basic tenet of all statutory construction is that words are construed in their ordinary meaning. Mason v. United States, 260 U.S. 545 (1923). Appellees' interpretation would negate the entire meaning of the word. See generally Sutherland, Statutory Construction §§ 47.17-47.22.

Even more importantly the meaning of "otherwise" is largely controlled by the meaning of "hold." Appellees, by adopting a narrow construction of the word "hold," argue that "otherwise" by its nature is circumscribed so as only to cover "means equivalent to assignment." Taking a less restrictive view of the meaning of "hold," however, immediately leads to a definition of "otherwise" which is more inclusive in ambit. We have discussed above the reasons for rejecting the definition of "hold" advanced by appellees, and no purpose would be served by a reiteration of the reasons given for adopting a definition which includes all mechanisms whereby control of and benefit from the entries are accumulated or transferred.

Clearly, the structure of control exhibited by the documentary submissions of both parties leads to the inescapable conclusion that Sailor Creek Water Company with the aid of the individual entrymen violated the prohibition against holding an excess of 320 acres of desert land prior to the obtaining of patent.

[4] Appellees contend that cancellation of the entries, even assuming a violation, would be improper for two reasons. First, they argue that a violation of the holding requirement is not a proper ground upon which to cancel the entries. Brief of Contestees and Intervenor at 265-74. Section 2 of the Act of March 3, 1891, 43 U.S.C. § 329, provides, in relevant part, that desert land entries:

* * * shall be subject to contest, as provided by the law, relating to homestead cases, for illegal inception, abandonment, or failure to comply with the requirements of law, and upon satisfactory proof thereof shall be canceled, and the lands, and moneys paid therefor, shall be forfeited to the United States. (Emphasis added).

Appellees contend that the underlined provision applies only to positive requirements of the law, e.g., cultivation of 1/8th of the entry within four years, but does not reach the negative prohibitions of the holding limitations. Such an interpretation can scarcely be credited, particularly since the Ninth Circuit Court of Appeals in Reed v. Morton, supra, specifically held that violations of the

prohibition against assignments to corporations, also a negative prohibition, warranted cancellation of the entries. We find that a holding in excess of 320 acres is a failure to comply with the requirements of law such as would require cancellation of the entry.

[5] The appellees also contend that the Government should be estopped from invalidating the entries. Their brief to this Board states:

* * * all the transactions which occurred between the entrymen and the water company or Morris and Noble were presented to the BLM either as part of the applications or as part of the feasibility report or in discussions with BLM representatives or as part of the supplemental proof submitted by each entryman. At the times it received the various items of information the BLM was obligated to advise the entrymen that it considered the transactions as constituting assignments which it could not recognize.

Appellees' Answer at 225.

While their argument is specifically directed at a finding of assignment, it is equally applicable to a violation of the holding requirement "by assignment or otherwise." Initially, it should be noted that the Government, as a general rule, is not estopped to attack illegality. Utah Power & Light Co. v. United States, 243 U.S. 389 (1917); Reed v. Morton, supra, at 643 (1973). The situations which estoppel will lie against the Government have been strictly circumscribed by various court decisions. See e.g. Brandt v. Hickel.

427 F.2d 53 (9th Cir. 1970); United States v. Lazy FC Ranch, 481 F.2d 985 (9th Cir. 1973). In Marathon Oil Co., 16 IBLA 298, 81 I.D. 447 (1974), this Board examined at some length the parameters within which the exception to the general rule is operative. Therein, we stated that an exception is recognized where: "(1) the erroneous advice is in the form of a crucial misstatement in an official decision; (2) the result of the misstatement violates standards of fundamental fairness; and (3) the public's interest is not unduly damaged by the imposition of the estoppel." Id. at 316, 81 I.D. at 455.

Appellees' contentions are clearly insufficient to invoke estoppel under the criteria set out above. They point to no "crucial misstatement in an official decision." Rather, they argue that they relied upon a failure of Governmental employees to inform them of the illegality of their actions. One could scarcely expect the Government to caution parties against illegal acts when such acts are not brought to the Government's attention until after their consummation. The illegal act involved herein was the result of the totality of the arrangements entered into between the entrymen and Sailor Creek Water Company. The Government was not informed of the terms of the lease agreement until after it made a specific request for the information (See e.g., Ex. G-2, Doc. 33). The leases had, in fact, been entered into the previous year, and had already been subleased for a one year term to Sailor Creek Water Company.

Having failed to inform the Government of the totality of their arrangements, appellees cannot be heard to argue that the Government's failure to warn them of their illegality supports the invocation of estoppel. Having examined the record before us, we find no alternative but to order the rejection of the final proofs tendered and cancellation of the entries.

As this holding is dispositive of the case, we find it unnecessary to rule on the other holdings in the decision of the Administrative Law Judge, or on the merits of the arguments of appellants thereon. This decision accords with our holdings in United States v. Golden Grigg, 19 IBLA 379, 82 I.D. 123 (1975), decided this date.

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 Administrative Law Judge is reversed, the final proofs are rejected and the case files are remanded for cancellation of the entries.

Douglas E. Henriques
Administrative Judge

We concur:

Edward W. Stuebing
Administrative Judge

Martin Ritvo
Administrative Judge

June 16, 1975

IBLA 71-209	:	Idaho 013820, etc
19 IBLA 350, 82 I.D. _____	:	
UNITED STATES	:	Desert Land Entries
	:	
v.	:	Errata
	:	
G. PATRICK MORRIS ET AL.	:	

ORDER

It has come to our attention that footnote #1 in the cited opinion does not correctly reflect the names and serial numbers of the contestees.

Footnote #1 19 IBLA at 353 should read as follows:

1/ The entries involved in this appeal are: G. Patrick Morris, I-013820; Joan E. Roth, I-013905; Elise L. Neeley, I-013906; Lyle D. Roth, I-013907; Vera M. Noble, I-014126; Charlene S. Baltzor, I-014128; George R. Baltzor, I-014129; John E. Morris, I-014130; Juanito M. Morris, I-014249; Nellie Mae Morris, I-014250; Milo Axelsen, I-014251; Peggy Axelsen, I-014252.

Douglas E. Henriques
Administrative Judge

We concur:

Edward W. Stuebing
Administrative Judge

Martin Ritv
Administrative Judge

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