

Editor's note: Reconsideration denied by order dated Aug. 31, 1978

UNITED STATES
v.
JOSEPH LARSEN AND FERRIS LARSEN

IBLA 78-193

Decided July 25, 1978

Appeal from decision of Administrative Law Judge R. M. Steiner declaring the Bootjack placer mining claim null and void. Contest CA-3591.

Affirmed.

1. Administrative Procedure: Burden of Proof -- Mining Claims: Contests -- Mining Claims: Discovery: Generally

Where a Government mineral examiner testifies that he has examined a mining claim and found the mineral values insufficient to support a finding of discovery, a prima facie case of invalidity has been established. Where the claimant presents evidence of returns which are so meager that they will not attract the labor and means of a person of ordinary prudence, he has failed to prove by a preponderance of the evidence that his claim is valid, and it is properly declared null and void.

2. Administrative Authority: Estoppel -- Equitable Adjudication: Generally -- Estoppel -- Federal Employees and Officers: Authority to Bind Government

Where a mining claimant alleges that forest rangers allowed him to build and occupy a cabin on the claim without informing him that it was illegal to do so, it is not appropriate to estop the Government from declaring the claim null and void, for several reasons: mere acquiescence in an

action is not "affirmative misconduct" by a Government employee, as it was not false representation or concealment of material facts done with the intent that the claimant rely thereon; the impression created by the inaction of the forest rangers was not erroneous and, so, claimant was not misled, as he could rightfully move the cabin to the site and occupy it as long as so doing was incident to mineral development of a valid mining claim; and because the claimant should have known that he could not live on the premises indefinitely despite his failure to develop the claim, and that he would have to move the cabin or lose it, if the claim was declared null and void.

3. Administrative Authority: Estoppel -- Federal Employees and Officers: Authority to Bind Government

The Government is not barred from declaring a mining claim null and void by the doctrine of laches.

APPEARANCES: Charles E. Townsend, Jr., Esq., San Francisco, California, for appellants.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

Joseph and Ferris Larsen (appellants) have appealed from a decision of Administrative Law Judge R. M. Steiner, dated December 30, 1977, declaring the Bootjack placer mining claim null and void. We affirm.

Contest complaint CA-3591 was issued on June 22, 1976, by the Bureau of Land Management (BLM), on behalf of the Forest Service. The complaint charged, *inter alia*, that there were not sufficient quantities of minerals present within the limits of the claim to constitute a discovery of a valuable mineral deposit within the meaning of the mining law.

[1] We have reviewed the record in this case and the arguments advanced by the parties. We are in agreement with the summary of the testimony, the summary of the applicable law, and the conclusion reached by Judge Steiner. Therefore, we adopt his opinion in its entirety as the opinion of the Board and attach a copy hereto.

[2] Appellants argue that the Forest Service is estopped from "evicting" Joseph Larsen from "his only place of residence," as he

was allowed to move a cabin to the site and improve it while forest rangers looked on without telling him that it was "illegal" to do so. Even apart from 43 CFR 1810.3, which provides that the United States is not bound by the acts of its officers and agents, we have concluded that this matter is not appropriate for the extraordinary relief of equitable estoppel.

Various courts have defined the elements which will give rise to an estoppel against the Government. They include United States v. Wharton, 514 F.2d 406 (9th Cir. 1975); Fox v. Morton, 505 F.2d 254 (9th Cir. 1974); C. F. Lytle Co. v. Clark, 491 F.2d 834 (10th Cir. 1974); Atlantic Richfield Co. v. Hickel, 432 F.2d 587 (10th Cir. 1971); Brandt v. Hickel, 427 F.2d 53 (9th Cir. 1970); United States v. Georgia-Pacific Co., 421 F.2d 92 (9th Cir. 1970); United States v. Lazy FC Ranch, 324 F. Supp. 698 (D. Idaho 1971), aff'd, 481 F.2d 985 (9th Cir. 1973); United States v. Eaton Shale Co., 433 F. Supp. 1256 (D. Colo. 1977), and authorities cited therein.

Despite generalized statements in various texts regarding the unavailability of estoppel against the Government, the United States Supreme Court has made it quite clear that this is true only when the Government agent making the representations acts beyond the scope of his authority. United States v. Eaton Shale Co., *supra* at 1272, citing Federal Crop. Ins. Co. v. Merrill, 322 U.S. 380 (1947); United States v. San Francisco, 310 U.S. 16 (1940); Utah Power and Light Co. v. United States, 243 U.S. 389 (1977). See also Utah v. United States, 284 U.S. 534, 545 (1932); Cramer v. United States, 261 U.S. 219, 234 (1922).

Judge Thompson's concurring opinion expresses her belief that, where conveyance of public property is involved, there is no authority in the Department to apply "court-created principles" of estoppel so as to do justice in cases where equity so requires, absent specific authority. Since we are not extending equitable relief in this instance, the question is academic. However, the United States Supreme Court, in Williams v. United States, 138 U.S. 514 (1891), declared, at p. 524:

We would not be misunderstood in respect to this matter. We do not mean to imply that any arbitrary discretion is vested in the Secretary; but we hold that the statute requiring approval by the Secretary of the Interior was intended to vest a discretion in him by which wrongs like this could be righted, and equitable considerations, so significant and impressive as this, given full force. It is obvious, it is common knowledge, that in the administration of such large and varied interests as are intrusted to the Land Department, matters not foreseen, equities not anticipated, and which are therefore not provided for by express statute, may sometimes arise, and therefore, that the Secretary of the Interior is given that superintending and supervisory

ing power which will enable him, in the face of these unexpected contingencies, to do justice.

Moreover, this Board has repeatedly dealt with assertions of equitable estoppel against the Department on the same basis as we now do in this case. See, e.g., Arthur W. Boone, 32 IBLA 305 (1977); Henry E. Reeves, 31 IBLA 242 (1977); United States v. Fleming, 20 IBLA 83 (1975); The Polumbus Corp., 22 IBLA 270 (1975).

An analysis of the operation of estoppel against the Government is contained in the judicial opinions delivered in the cases of United States v. Wharton, *supra*; United States v. Lazy FC Ranch, *supra*; and United States v. Georgia-Pacific Co., *supra*. Under these holdings, in order for estoppel to lie against the Government, *inter alia*, the individual asserting estoppel must have relied to his detriment on misinformation received on account of some affirmative misconduct by Government agents acting within the scope of their authority, on which misinformation the party had a reasonable right to, and did, rely. Moreover, the individual must not have known the true state of affairs.

The alleged failure by forest rangers to notify appellants that it was illegal to move their cabin to the site and occupy it was not affirmative misconduct within the meaning of the term as set out in Wharton, *supra*. Equitable estoppel will not operate to bar a mining claim contest or alter its result where it is not shown that some officer of the Government, who was authorized to declare the claim valid, falsely represented to, or concealed material facts from the claimants concerning the validity of the claims with the intention that the claimants should act in reliance thereon with the result that the claimants were thereby induced to do so, to their ultimate damage. United States v. Johnson, 23 IBLA 349, 355-56 (1976); United States v. Fleming, 20 IBLA 83, 97 (1975), and cases cited. Appellants have not shown that the forest rangers either falsely represented to, or concealed material facts from them. Moreover, forest rangers "have no authority at all to dispose of Government property [and] cannot by their conduct cause the Government to lose its valuable rights * * *," United States v. California, 332 U.S. 19, 40 (1947).

Even were we to disregard the foregoing, appellant would still not prevail, as he was not misled by the inaction of the forest rangers, or otherwise unfairly disadvantaged by good faith reliance on it. For all the forest rangers knew, appellants were installing this cabin incident to their intended mining activities on the site. A mining claimant has the right to use the surface of his claim for purposes incident to mining. See Bradley-Turner Mines, Inc. v. Branagh, 187 F. Supp. 665, 666 (D.C.N.D. Cal. 1960), *aff'd*, 294 F.2d 954 (9th Cir. 1961); United States v. Rizzinelli, 182 Fed. 675, 680 (D.C. Id. 1910); Teller v. United States, 113 Fed. 273 (8th Cir. 1901). The record indicates that appellants made some use of this

cabin for storing mining equipment (Tr. 18, 38). ^{1/} Under these circumstances, the rangers obviously did not mislead appellants by not telling them that it was illegal to install the cabin, as, in fact, at the time, it was probably not illegal to do so. Where the impression created by actions of agents of the Government is not patently erroneous, estoppel does not operate. United States v. Tippetts, 29 IBLA 348 (1977).

In any event, appellants should have known that, if they failed to make a discovery, and their mining claim was accordingly invalid, they would have to remove the cabin or lose it, and that Joseph Larsen could not live there indefinitely despite their failure to develop the claim as a mine, and it was not up to the forest rangers to advise them otherwise. Accordingly, the determination that their mining claim is null and void, and the consequent conclusion that their continued occupancy is unlawful, works no inequity.

[3] Finally, we reject appellants' assertion that the Government is estopped by the doctrine of laches from declaring their claim null and void. Under 43 CFR 1810.3(a), the authority of the United States to enforce a public right, including the right to cancel invalid mining claims which encumber the public lands, is not vitiated or lost by acquiescence of its agents, or by their laches, failure to act, or delays in the performance of their duties. Montana Copper King, 20 IBLA 30 (1975); United States v. Zweifel, 11 IBLA 53, 80 I.D. 323 (1973), aff'd sub nom., Roberts v. Morton, 549 F.2d 158 (10th Cir. 1977); see Estate of Malcolm McKinnon, 31 IBLA 290 (1977); Guy W. Franson, 30 IBLA 123 (1977).

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.

Edward W. Stuebing
Administrative Judge

I concur:

Douglas E. Henriques
Administrative Judge

^{1/} Joseph Larsen testified that he did not move onto the claim until June 1977 (Tr. 25), after the initiation of this contest. Prior to this time, the cabin was used only about 1 week per year for recreation (Tr. 34).

ADMINISTRATIVE JUDGE THOMPSON CONCURRING IN THE RESULT:

I agree with the conclusions there has been no discovery of a valuable mineral deposit and any alleged failure of Forest Service employees concerning claimants' cabin afford them no rights to the claim. I wish to emphasize, however, my views concerning the application of the doctrine of estoppel to gain rights against the United States to its public land and natural resources. There are, of course, court cases which state exceptions to the general principle that the doctrine of estoppel is not applicable against the United States. Where public property is involved, however, I do not believe this Board has any authority to apply court-created principles so as to authorize the conveyance of public land contrary to the delegation of authority to this Department by Congress. 43 CFR 1810.3. As the Supreme Court has stated in United States v. California, 332 U.S. 19, 40 (1947):

The Government, which holds its interests here as elsewhere in trust for all the people, is not to be deprived of those interests by the ordinary court rules designed particularly for private disputes over individually owned pieces of property; and officers who have no authority at all to dispose of Government property cannot by their conduct cause the Government to lose its valuable rights by their acquiescence, laches, or failure to act. 22/

22/ United States v. San Francisco, 310 U.S. 16, 31-32; Utah v. United States, 284 U.S. 534, 545, 546; Lee Wilson & Co. v. United States, 245 U.S. 24, 32; Utah Power & Light Co. v. United States, 243 U.S. 389, 409. See also Sec'y of State for India v. Chelikani Rama Rao, L.R. 43 Indian App. 192, 204 (1916).

This is the general rule still recognized by the courts. E.g., Union Oil Co. of California v. Morton, 512 F.2d 743, 748 (9th Cir. 1975). In footnote 2 of Union Oil at 748, the Circuit Court notes some of the cases where estoppel has been applied against the Government, indicating that it is only where the Government's "wrongful conduct threatens to work a serious injustice and if the public's interest would not be unduly damaged by the imposition of estoppel." It went on to say: "We are very reluctant to apply estoppel against the Government in cases involving rights to public land, however." In any given case where a conveyance of fee interest is involved or where there is enforcement of a public interest -- such as a mining contest to determine the validity of a mining claim clouding the Government's title -- this Board should be even more reluctant to find

estoppel applicable against the Government since we do not have the same authority that courts have in applying common law equitable doctrines.

Joan B. Thompson
Administrative Judge

36 IBLA 136

December 30, 1977

United States of America,	:	<u>Contest No. CA! 3591</u>
	:	
Contestant	:	Involving the BOOTJACK Placer
	:	Mining Claim, situated in
v.	:	NW! 1/4 Sec. 24, T. 13 N.,
	:	R. 11 E., M.D.M., El Dorado
Joseph Larsen, <u>et al.</u> ,	:	County, California
	:	
Contestees	:	

DECISION

Appearances: Charles F. Lawrence, Esq.
Office of the General Counsel
U.S. Department of Agriculture
For the Contestant

Joseph Larsen
F. D. Larsen
In Propria Persona

Before: Administrative Law Judge Steiner

This is an action brought by the United States Bureau of Land Management pursuant to the Hearings and Appeals Procedures of the Department of the Interior, 43 C.F.R. Part 4, to determine the validity of the above-named placer mining claim.

The Contestant filed a Complaint herein on June 22, 1976, alleging, inter alia, as follows:

- "A. There are not presently disclosed within the boundaries of the mining claim minerals of a variety subject to the mining laws, sufficient in quantity, quality, and value to constitute a discovery.

B. The land embraced within the claim is non-mineral in character."

The Contestees filed a timely Answer generally denying the foregoing allegations of the Contestant's Complaint.

A hearing was held in Sacramento, California.

Henry W. Jones, after having been duly qualified as a mining engineer, testified that the claim was located on June 26, 1946, and conveyed to the Contestees on September 10, 1959. He examined the claim on June 5, 1975 at which time one of the mining claimants identified a quartz vein exposed in a small adit at the site of a spring. He took two samples from the adit. The assay report of the two samples, Exhibit No. 4, shows gold values of .02 and .03 troy ounces per ton and silver values of .07 and .04 troy ounces per ton. The mining and milling costs of the quartz vein would be far in excess of the values indicated by the samples. The mining claimant did not point out any placer deposits. Exhibit No. 3 is a sketch portraying the entire claim showing the locations of a cabin, roads, the spring, a narrow placer cut, and a shaft. The cut was eight to ten feet deep and six feet wide. In 1977, he took a third sample from the bottom of a small dry wash. The sample was panned. He found no gold, black sands, or concentrates.

He did not observe any placer deposits other than that from which he took the third sample which had no mineral values. There was evidence of lode and placer mining having been done on the claim twenty to fifty years ago. There was no evidence of recent work. He observed no mining equipment and there was no water available for mining uses.

It was his opinion, based upon his examination and the results of his sampling, that a prudent person would not be justified in expending additional time, effort and money, with a reasonable hope of developing a paying mine.

On cross examination, he stated that he did see an old sluice box, not in workable condition, and there was no indication that it had been used.

Joseph Larsen testified that he found gold in a draw below the cabin and copper and silver in an area above the cabin. The copper and silver were found several years ago in a ledge. The material from the ledge had been assayed, but he had no copies of the assay report. He did not save or sell any copper or silver. He had been to the bottom of the 45-foot shaft and observed gravel, but he took no samples. He had sluiced gravel material in a draw and recovered gold several years ago. He sold a little bit less than an ounce of gold to friends who used it to make jewelry. About five years earlier, he had dug an eight or nine foot tunnel into the hill from the draw. He did not find anything but the indications looked good.

Ferris Larsen testified that he had taken pan samples and made surface excavations. They had installed two water tanks, one 3,000 gallon tank and one 400 gallon tank. None of the gold which they had recovered came from the adit. During the past eighteen years, they had used the cabin as a recreation spot an average of two weeks each year. He had no assay reports of samples taken from the claim.

Under the mining laws of the United States (30 U.S.C. § 22 et seq. (1970)) a valid location of a placer mining claim requires discovery of a valuable mineral deposit within the limits of the claim. The rule as to what constitutes a valid discovery has been stated as follows:

"* * * Where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine, the requirements of the statute have been met. * * *." Castle v. Womble, 19 L.D. 455, 457 (1894); Chrisman v. Miller, 197 U.S. 313 (1905); Best v. Humboldt Placer Mining Co., 371 U.S. 334 (1963).

When the Government contests a mining claim it has assumed the burden of presenting a prima facie case that the claim is invalid. When it has done so, the burden then devolves on the mining claimant to prove by a preponderance of the evidence that the claim is valid. United States v. Zweifel, 508 F. 2d 1150, 1157 (10th Cir. 1975); United States v. Springer, 491 F. 2d 239, 242 (9th Cir.), cert. denied, 419 U.S. 234 (1974); Foster v. Seaton, 271 F. 2d 836, 838 (D.C. Cir. 1959).

The ultimate burden of proving discovery is always upon the mining claimant. United States v. Springer, supra.

Where a Government mineral examiner testifies that he has examined a claim and found the mineral values insufficient to support a finding of discovery, a prima facie case of invalidity has been established. Government mineral examiners are not required to perform discovery work for a claimant or to explore beyond a claimant's workings. United States v. Ruth Arcand, et al., 23 IBLA 226 (Jan. 1, 1976).

Returns which are so meager that they will not attract the labor and means of a person of ordinary prudence are not sufficient to demonstrate discovery of a valuable mineral deposit. United States v. Ruth Arcand, et al., supra.

The Contestant has established, prima facie, by the testimony of its expert witness, that there are no mineral deposits exposed on the claim which would justify a person of ordinary prudence in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine.

It is apparent from the record that the Contestees have not recovered any significant amounts of gold or other minerals from the subject claim. Nor have they designated or identified any specific placer deposit bearing sufficient mineral values to warrant its development.

The mining claimants have failed to introduce sufficient probative evidence of a valid discovery of a valuable mineral deposit to overcome the prima facie case of lack of discovery established by the Contestant.

Accordingly, the Bootjack Placer Mining Claim is hereby declared null and void.

R. M. Steiner
Administrative Law Judge

