

PUBLIC SERVICE CO. OF OKLAHOMA

IBLA 78-457

Decided December 6, 1978

Appeal from decision of the Arizona State Office, Bureau of Land Management, holding mining claims abandoned and void. AMC 843 et al.

Affirmed.

1. Federal Land Policy and Management Act of 1976: Generally—Federal Land Policy and Management Act of 1976: Filing Requirements

Where the owner of unpatented mining claims located after Oct. 21, 1976, fails to file evidence of annual assessment work or a notice of intention to hold the claims prior to December 31 of the year following the calendar year in which the claims were located, the claims are properly deemed abandoned and void pursuant to sec. 314 of the Federal Land Policy and Management Act of Oct. 21, 1976, 43 U.S.C.A. § 1744 (Supp. 1978), and 43 CFR 3833.2-1(b)(1) and 43 CFR 3833.4(a).

2. Administrative Authority: Generally

Erroneous or incomplete advice by Bureau of Land Management employees cannot operate to vitiate an Act of Congress, particularly where the governing statute and regulations on the issue are free from ambiguity.

APPEARANCES: John C. Lacy, Esq., DeConcini, McDonald, Brammer & Yetwin, Tucson, Arizona, for appellant.

OPINION BY ADMINISTRATIVE JUDGE FISHMAN

Public Service Co. of Oklahoma has appealed from a decision dated May 22, 1978, of the Arizona State Office, Bureau of Land Management (BLM), rejecting appellant's filings for recordation and

deeming its mining claims, situated in Mohave and Yavapai Counties, Arizona, abandoned and void. 1/

The claims were located on November 19, December 8 and 29, 1976. The recordation notices were filed on January 31, 1977.

The basis for BLM's decision was 43 CFR 3833.2-1(b)(1), reiterating essentially section 314(a) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C.A. § 1744(a) (Supp. 1978), which regulation provides:

The owner of an unpatented mining claim located after October 21, 1976, shall, prior to December 31 of each year following the calendar year in which such claim was located, file in the proper BLM office evidence of annual assessment work performed during the preceding assessment year or a notice of intention to hold the mining claims. [Emphasis supplied.]

The decision held that appellant had failed to file either evidence of annual assessment work performed or a notice of intention to hold the claims for the year ending December 31, 1977. 43 CFR 3833.4(a) provides that the failure to file either instrument within the time allowed "shall be deemed conclusively to constitute an abandonment of the mining claims[s] * * * and [they] shall be void." This provision is a paraphrase of section 314(c) of FLPMA, 43 U.S.C.A. § 1744(c) (Supp. 1978).

In its statement of reasons appellant does not deny that it failed to file either instrument. It asserts, however, that it was not required to provide evidence of assessment work and that its failure to do so should not result in forfeiture of its claims. Appellant further alleges that "probably the most compelling reason for the incorrectness and inconsistency [of the decision] is the fact that the regulations * * * do not require the claimant to make any filing after the issuance of the certificate of final entry." In this connection appellant cites 43 CFR 3833.2-4 which states that evidence of annual assessment work performed or a notice of intention to hold a mining claim need not be filed where an application for mineral patent has been filed and a final certificate has been issued.

Appellant also appears to contend that in its situation there was no requirement for annual assessment work and consequently no need to file evidence or a notice of intention.

1/ The appeal involves 280 unpatented lode mining claims, Arizona serial Nos. AMC 843 through 1120 and AMC 1758 through 1760. A list of the claims is attached to the BLM decision in the case file.

Appellant asserts that the forfeiture provisions are ambiguous and that it was orally misinformed about filing requirements by BLM personnel. Although appellant filed with its statement of reasons a copy of the BLM pamphlet "Questions and Answers - Recording of Mining Claims," appellant did not ever assert that it relied upon the information in the pamphlet.

[1] The Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C.A. § 1744 (Supp. 1978) and the regulations which implement it concisely state the consequences of failing to file the instruments required in connection with location, recordation, and holding of mining claims. The Board has held in several decisions that where these requirements are not met, mining claims are properly deemed abandoned and void. Ronald R. Nordwick, 36 IBLA 238 (1978); R. Wade Holder, 35 IBLA 169 (1978); Northwest Citizens for Wilderness Mining Co., Inc., 33 IBLA 317 (1978); Southwest Exploration Associates, 33 IBLA 240 (1977).

Appellant has presented no cogent support for its argument that it was not required to provide a notice of intention to hold or evidence of assessment work performed and this requirement is clearly mandated by the statute and regulations. Its challenge to the decision on the basis of 43 CFR 3833.2-4 is without merit since there is no indication that an application for mineral patent was filed and a final certificate issued. Although appellant has discussed the applicable statute and regulations at length, no cognizable reason why its situation is beyond their ambit has been demonstrated. We conclude therefore that the decision appealed from properly held the claims abandoned and void.

[2] Similarly without merit is appellant's contention that it relied to its detriment on erroneous or incomplete information provided orally by BLM employees. Such misinformation cannot operate to vitiate an Act of Congress, particularly where the governing statute and regulations on the issue are free from ambiguity. Belton E. Hall, 33 IBLA 349 (1978); Goldberg v. Weinberger, 546 F.2d 477 (2nd Cir. 1976), cert. denied sub nom. Goldberg v. Califano, 431 U.S. 937 (1977); Mark W. Boone, 33 IBLA 32 (1977); Verner F. Sorenson, 32 IBLA 341 (1977); W. R. C. Croley, 32 IBLA 5 (1977); Estate of Malcolm N. McKinnon, 31 IBLA 290 (1977); 43 CFR 1810.3(c). Cf. California Pacific Bank v. Small Business Administration, 557 F.2d 218 (9th Cir. 1977). Byrne Organization, Inc. v. U.S., 287 F.2d 582, 587 (Ct. Cl. 1961); Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380 (1947); Utah Power and Light Co. v. United States, 243 U.S. 389, 409 (1917).

We recognize appellant's assertion that it was misled orally by personnel of BLM. We also recognize that the question and answer

sheet, subsequently corrected in October 1977, categorically stated that the notice of intention to hold or evidence of annual assessment work had to be filed within the calendar year following the year of recordation. However, during the calendar year of 1977, which was the year after the location of the claims, the law, 43 U.S.C.A. § 1744 (Supp. 1978), and the regulation, 43 CFR 3833.2-1 (b)(1), provided, and still provide, that the notice of intention, or evidence of assessment work performed had to be filed during the calendar year following the year of location of the claims. In essence, appellant asserts that the doctrine of estoppel should operate in its favor.

In Hampton v. Paramount Pictures Corp., 279 F.2d 100, 104 (9th Cir. 1960), the court discussed the concept of estoppel, reiterated in large measure in Wharton, cited in the dissent hereto with approval. In Hampton, the court stated:

Four elements must be present to establish the defense of estoppel: (1) The party to be estopped must know the facts; (2) he must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended; (3) the latter must be ignorant of the true facts; and (4) he must rely on the former's conduct to his injury. California State Board of Equalization v. Coast Radio Products, 9 Cir., 228 F.2d 520, 525.

The trial court assumed the existence here of the first of these elements and made no mention of the third. However, the court held against appellant on the second and fourth elements. Specifically, the court found that there was no holding out by Paramount or any change of position by Hampton in reliance upon any act of omission by Paramount.

A holding out may be accomplished by silence and inaction. 3 Pomeroy's Equity Jurisprudence, 5th ed., § 818. But Paramount's assertion of copyright was clearly printed on the film in question in strict accordance with statutory requirements. Paramount had the right to assume that this printed assertion of right, which was flashed on the screen every time the film was shown, provided ample notice to Hampton of Paramount's interest in the film. Being charged with this notice, Hampton could easily have ascertained the facts by making inquiry of Paramount.

The doctrine of equitable estoppel does not erase the duty of due care and is not available for the protection of

one who has suffered loss solely by reason of his own failure to act or inquire. See *Rex v. Warner*, 183 Kan. 763, 332 P.2d 572. [Emphasis supplied.]

In the case at bar, appellant cannot be said to have reasonably relied upon the asserted advice and the question and answer sheet when their contents were diametrically contravened by the statute and regulations. No. 3 of the Hampton criteria, reiterated in *United States v. Georgia-Pacific Corp.*, 421 F.2d 92, 96 (9th Cir. 1970), envisages that the party seeking to impose the estoppel "must be ignorant of the true facts."

The Department, in administering the public land laws, has required in color of title cases, not only a belief of purported owners that their title was good, but also a justifiable basis for such belief that they had good title. *Harold C. Rosenbaum*, 5 IBLA 76, 79 I.D. 38 (1972); a mere "sincere belief" is insufficient. *Marcus Rudnick*, 8 IBLA 65 (1972); see *Cloyd and Velma Mitchell*, 22 IBLA 299 (1975); *S. V. Wantrup*, 5 IBLA 286 (1972).

In *Minnie E. Wharton, et al.*, 4 IBLA 287, 79 I.D. 6 (1972), rev'd on other grounds, 514 F.2d 406 (9th Cir. 1975), the syllabus recites in part as follows:

Good faith in adverse possession requires that a claimant honestly believed there was no defect in his title and the Department may consider whether such belief was unreasonable in the light of the facts then actually known or available to him. Once it is established that the claimant knew that the land was owned by the government and that he did not have a valid title, he is presumed to know that under the law he cannot acquire title or any right to the land merely by continuing to occupy it. There can be no such thing as good faith in an adverse holding where the party knows he has not title or fails to demonstrate a rationally justifiable reason for believing that he had title.

We cannot accept the view that appellant was justifiably ignorant of the need to file evidence of assessment work or a notice to hold prior to December 31, 1977, where the statute and regulation were clear. This Board on May 15, 1978, in *Paul S. Coupey*, 35 IBLA 112, 116 (1978), clearly enunciated the governing principles as follows:

For claims located after October 21, 1976, the statute and regulation are specific and different. The statute provides that the owner of such a claim must file a notice of

intention to hold the mining claim prior to December 31 of each year following the calendar year in which said claim was located. Sec. 314(a) and (a)(1), supra. The regulation repeats the statute. 43 CFR 3833.2-1(b)(1). Since Coupey's claims were located in 1976, the notices of location had to be filed prior to December 31, 1977.

The brief and summary explanation set out in the question and answer release cannot replace the exact requirements of the statute and regulation. As has been held many times, and indeed, as the pertinent regulation provides, reliance on erroneous advice by the BLM employees cannot estop the United States or confer on an applicant any right not authorized by law. Charles M. Brady, 33 IBLA 375 (1978); Belton E. Hall, 33 IBLA 349 (1978); Northwest Citizens For Wilderness Mining Co., Inc., 33 IBLA 317 (1978); Charles House et al., 33 IBLA 308 (1978), and cases cited; 43 CFR 1810.3(b) and (c). Thus, the question and answer release cannot relieve the appellant of his obligation to comply with the filing requirements of the statute or suffer the consequences.

The holding in Coupey was reenunciated on September 6, 1978, in Donald H. Little, 37 IBLA 1 (1978).

The Supreme Court has stated that "[t]he doctrine of equitable estoppel is not a bar to the correction by the Commissioner of a mistake of law." Automobile Club v. Commissioner, 353 U.S. 180, 183 (1957). This concept had been recognized earlier by the D.C. Circuit in Schafer v. Helvering, 83 F.2d 317, 321 (D.C. Cir. 1936): "Whoever deals with the government does so with notice that no agent can, by neglect or acquiescence, commit it to an erroneous interpretation of the law." See also 46 Univ. Col. L. Rev. 433, 444 (1974).

In United States v. City and County of San Francisco, 310 U.S. 16, 31-32 (1940), the court stated:

A substantial part of the City's argument rests upon its claim that the Department of the Interior in the period from 1913 to 1937 construed § 6 to forbid no more than sale of power for resale. We are asked to accept these administrative interpretations. And in addition the City suggests that conduct of the Department, of which these interpretations were a part, is sufficient to create an estoppel against the Government. Whether the Department at any time ever did more than merely to tolerate sale and distribution of Hetch-Hetchy power by the Company as a temporary expedient is doubtful. Certain it is, however, that in 1935 the

Secretary of the Interior declared the City's disposition of the power through the Company to be a violation of § 6, demanded discontinuance of this violation without success and thereafter instigated this proceeding. We cannot accept the contention that administrative rulings – such as those here relied on – can thwart the plain purpose of a valid law. As to estoppel, it is enough to repeat that "... the United States is neither bound nor estopped by acts of its officers or agents in entering into an arrangement or agreement to do or cause to be done what the law does not sanction or permit." [Emphasis supplied; footnote omitted.]

In West Va. Div. of Izaak Walton L. of Am. v. Butz, 522 F.2d 945, 955 (4th Cir. 1975), the court denied its authority to rewrite an Act of Congress, saying:

We are not insensitive to the fact that our reading of the Organic Act will have serious and far-reaching consequences, and it may well be that this legislation enacted over seventy-five years ago is an anachronism which no longer serves the public interest. However, the appropriate forum to resolve this complex and controversial issue is not the courts but the Congress. The controlling principle was stated in United States v. City and County of San Francisco, 310 U.S. 16, 29-30, 60 S.Ct. 749, 84 L.Ed. 1050 (1940):

"Article 4, § 3, Cl. 2 of the Constitution provides that 'The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.' The power over the public land thus entrusted to Congress is without limitations. 'And it is not for the courts to say how that trust shall be administered. That is for Congress!'" (footnotes omitted).

A fortiori, a clerk in a BLM office, cannot by misadvice create an estoppel against the United States, thus pro tanto repealing the statute in favor of the person so misadvised. 2/

2/ In Union Oil Co. v. Morton, 512 F.2d 743, 748 (9th Cir. 1975), the court stated in a footnote that the "Secretary's issuance of a [OCS] lease and Union's reliance on its terms do not estop the Government from enforcing statutory provisions contrary to the lease."

I also note the opinion of the then Acting Deputy Solicitor, "Effect of Failure to Record Timely under sec. 314(b) Federal Land Policy and Management Act of 1976," 84 I.D. 188, 191 (1977). Although that opinion is addressed solely to the requirement of recordation of the location, the penalty provision, section 314(c), for failure to so comply is the same provision that applies to failure to timely file notice of intention to hold or an affidavit of assessment work.

The opinion at 84 I.D. 191-192 discusses section 314(c) as follows:

Since the requirement to file is mandatory, it is necessary to determine what consequences attach to the

fn. 2 (continued)

The Comptroller General at 56 C.G. 85, 89 (1976), has taken a position consistent herewith:

"* * * There is no doubt that Federal employees, and ordinary citizens, are presumed to know the contents of the United States Code. Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380 (1947).

"We believe the rule stated by the Supreme Court in Utah Power & Light Co. v. United States, 243 U.S. 389 (1917), is still correct:

"* * * that the United States is neither bound nor estopped by acts of its officers or agents in entering into an arrangement or agreement to do or cause to be done what the law does not sanction or permit. (243 U.S. at 409)"

This position was restated and followed in Montilla v. United States, 457 F.2d 978 (Ct. Cl. 1972). In that case, the plaintiff was seeking retired pay for service in the Army Reserves. He contended that the Government was estopped to deny him benefits based upon insufficient years of service in the active reserves, because he had relied on statements and letters from Army officials stating, or at least inferring, that he had enough service in the active reserves. In holding that the statutory service requirements must be strictly fulfilled, the court stated that:

"It is true that the government may be estopped by the acts and conduct of its agents where they are duly authorized and are acting within the scope of their authority and in accordance with the power vested in them, as, for instance, in certain cases involving contractual dealings with the government. But we know of no case where an officer or agent of the government, such as Colonel Powell of the Army in the case before us, has estopped the government from enforcing a law passed by Congress. Unless a law has been repealed or declared unconstitutional by the courts, it is a part of the supreme law of the land and no officer or agent can by his actions or conduct waive its provisions or nullify its enforcement. (457 F.2d at 986-987)"

failure to file. Sec. 314(c) of FLPMA says, "The failure to file such instruments as required by subsections (a) and (b) shall be deemed conclusively to constitute the abandonment of the mining claim." Although the determination whether real property, including a mining claim, has been abandoned normally depends on the intention of the owner, e.g., Lakin v. Sierra Buttes Gold Mining Co., 25 F. 337 (C.C.D. Cal. 1885); Hurkander v. Carrol, [sic] [3/] 76 F 474 (D. Alaska 1896), Congress here has explicitly provided that failure to record is to be "deemed" to be an abandonment. By using the word "deem," Congress established a substantive rule of law that a failure to record, in time is an abandonment without regard to the locator's intent. See Bowers v. United States, 226 F.2d 424, 428-29 (5th Cir. 1955), Kohn v. Myers, 266 F.2d 353, 357 (2d Cir. 1959). I hold that regardless of the intent of a locator, for the purpose of section 314 of FLPMA, a claim not recorded timely is abandoned. The consequence of abandonment is clear: an abandoned claim reverts to the status of the public domain and is void. Farrell v. Lockhart, 210 U.S. 142, 147 (1908), Brown v. Gurney, 201 U.S. 184, 193 (1906); Hurkrader v. Carroll, [sic] [4/] *supra*; Gabbs Exploration Co. v. Udall, 315 F.2d 37 (D.C. Cir.), *cert. den.*, 375 U.S. 822 (1963); Belk v. Meagher, 104 U.S. 279-283-4 (1881). See also discussion of legislative history of FLPMA, *supra*. I hold that under section 314(b), (c) of FLPMA, a mining claim is void if the locator does not file a notice of recordation in the proper Bureau of Land Management office within 90 days from the date of location.

Regulations

On Jan. 21, 1977, 42 FR 5289, the Department adopted regulations to assist mining claimants in complying with the requirements of sec. 314(b) of the FLPMA. I have reviewed these regulations and I conclude that they are consistent with the FLPMA. The regulations state, in part, that:

- (1) The requirement to file a notice of recordation within the 90 day period required by the statute is mandatory (43 CFR 3833.2-1); and
- (2) that a claim for which a notice of recordation is not timely filed is void (43 CFR 3833.4).

[3/] The correct name of the case is Harkrader v. Carroll.

[4/] See footnote 3.

Summary

The holder of a mining claim located after Oct. 21, 1976, must file a notice of recordation with the proper BLM office within 90 days from the date of location. The FLPMA does not permit the Secretary to accept or give effect to notice of recordation that is not filed on time. If a claim is not recorded in the required period, the land reverts to the public domain and the mining claim is void.

Thus this opinion, M-36889 of May 17, 1977, issued some 7 months prior to the last date appellant could file notices to hold or affidavits of assessment work, clearly shows that failure to comply with the statutory mandates results in invalidation of the mining claims. Also the opinion shows that the correct version of the time for filing notices of intention to hold or affidavits of assessment work was embodied in regulations virtually the whole calendar year of 1977. See Donald H. Little, supra, reiterating the necessity of timely filing of the notice of intention to hold.

The dissent's postulate that if "there have been discoveries, the claims could be of great value" is an indulgence in rank speculation.

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.

Frederick Fishman
Administrative Judge

I concur.

Douglas E. Henriques
Administrative Judge

ADMINISTRATIVE JUDGE GOSS DISSENTING:

The issue before the Board is whether appellant must be deemed to have abandoned some 280 lode mining claims because of a failure under 43 U.S.C.A. § 1744 (Supp. 1978) to file evidence of annual assessment work or notice of intention to hold the claims. If there have been discoveries, the claims could be of great value.

The claims are stated to have been located November 19, 1976, and December 8, 1976. They were filed with the Arizona State Office on February 28, 1977. Appellant alleges reliance upon affirmative misconduct on the part of BLM officials in incorrectly advising, in response to inquiry by appellant's representative, that nothing needed to be filed by December 1977 because the claims were then only in their first year. Affidavit of Phyllis R. Phillips.

The State Office has not been given an opportunity to respond to Mrs. Phillips' affidavit. I would remand the case for that purpose.

If the facts are as stated, ^{1/} then the case is governed by United States v. Wharton, 514 F.2d 406 (1975). Therein, the 9th Circuit ^{2/} held that U.S. Immigration and Naturalization Service v. Hibi, 414 U.S. 5 (1973), does not preclude the invoking of estoppel against the Government. The Whartons had asserted affirmative misconduct on the part of BLM officials in that such officials had misrepresented that there was no way the Wharton family could obtain title to certain lands, this at a time when it was still possible to do so. In Wharton the court interpreted the Hibi phrase "affirmative misconduct" and made it clear that affirmative misconduct may be present without any degree of mens rea on the part of Government officials:

^{1/} The affidavit is supported by a publication, "Questions and Answers RECORDING OF MINING CLAIMS U.S. Department of the Interior/Bureau of Land Management, January 1977." Portions thereof are as follows:

"Q. When do I file a notice of intent?"

"A. When physical or legal impediment beyond the control of the owner prevents the filing of evidence of assessment work.

"Q. How often do mining claim owners file this assessment work or notice of intent?"

"A. All claimants must file either evidence of assessment work or a notice of intent by December 31 of the calendar year following the date of recordation with BLM. All claims or sites located on or before October 21, 1976, have three years from October 21, 1976 to be recorded with BLM. For claims located after October 21, 1976, you have 90 days from the date of location to record with BLM." (Emphasis added.)

^{2/} The case now on appeal also arises within the 9th Circuit.

[In Hibi] there was a vigorous dissent, and the majority qualified its holding by saying that, although the question of whether affirmative misconduct (rather than mere neglect) on the part of the government might estop it had been left open in Montana v. Kennedy, 366 U.S. 308, 314, 315 * * * (1961), no such conduct was involved in Hibi. The Court did not preclude invoking estoppel against the government.

In the case before us, the Whartons assert affirmative misconduct on the part of BLM officials, not merely a failure to advise them of their rights. John Wharton had approached government officials to determine what his family could do to gain title to the land. Those officials misrepresented to him that there was no way at a time when it was still possible to do so.

* * * * *

The Secretary * * * argues that the Whartons' reliance on United States v. Georgia-Pacific Corporation, 421 F.2d 92 (9th Cir. 1970), is misplaced since it concerned a private contract rather than an attempt to gain title to public lands. In Georgia-Pacific we held that estoppel could be applied against the government, saying that "the dictates of both morals and justice indicate that the Government is not entitled to immunity from equitable estoppel in this case." Id. at 103. 4/

Since Georgia-Pacific we have made it clear that estoppel may be applied against the government acting in its sovereign capacity. See United States v. Lazy FC Ranch, 481 F.2d 985 (9th Cir. 1973). And our decision in Standard Oil Co. v. California, 107 F.2d 402, 416 (9th Cir. 1939), indicates recognition of the principle that estoppel can apply against the government even in

4/ The issue in Georgia-Pacific was enforcement of a private contract to gain title to new lands, not preservation of public lands; however, we did not preclude the possibility of estoppel in the latter instance. We noted only that, because the issue under consideration was one of contract, the government was acting in a proprietary rather than a sovereign role, and we did not have to decide if the government could be estopped while acting in its sovereign capacity.

disputes over public land, although in that case no sufficient showing of laches or estoppel was made. ^{5/}

This circuit's position on estoppel and its availability as a defense against the government was clearly expressed in United States v. Lazy FC Ranch, *supra*. * * * In applying estoppel against the government, we relied on Moser v. United States, 341 U.S. 41 * * * (1951), in which the Supreme Court permitted the government to be estopped even though it was acting in a sovereign capacity. To do otherwise, the Court indicated, would violate notions of "elementary fairness." Id. at 47 * * *. In Lazy FC Ranch we noted that this court had previously followed the Moser rationale and permitted estoppel to be used against the government where basic notions of fairness required it to do so, citing Schuster v. C.I.R., 312 F.2d 311 (9th Cir. 1962), and Brandt v. Hickel, 427 F.2d 53 (9th Cir. 1970). ^{6/}

^{5/} Other courts have permitted estoppel to be used against the government in cases involving public land, or have indicated that estoppel would have applied on a proper showing of misrepresentation or reliance on governmental action. United States v. Big Bend Transit Co., 42 F.Supp. 459 (E.D. Wash. N.D. 1942); Udall v. Oelschlaeger, 129 U.S.App.D.C. 13, 389 F.2d 974 cert. denied 392 U.S. 909 * * * (1968).

^{6/} In Schuster, the Commissioner of Internal Revenue originally determined that certain assets of an estate were not taxable. Relying on the ruling, the trustee distributed the assets to the beneficiary. A year later, the commissioner reversed his decision and sent notices of deficiency to the trustee and beneficiary. This court held that the commissioner was estopped from holding the trustee liable for any tax deficiency. Although we recognized the general principle that estoppel could not be asserted against the government, we ruled that the commissioner could not always correct a legal mistake regardless of the injustice which will result.

Brandt v. Hickel * * * involved a letter from a BLM office in Los Angeles advising two applicants for an oil and gas lease that they would not lose their priority if they refiled a corrected application form within 30 days. This promise was unauthorized by statute, regulation, or decision. Another person filed before they refiled, and the Secretary of the Interior determined they had lost their priority. We held that the Secretary's decision was inconsistent with due process since the plaintiffs had not been properly notified what to do. The erroneous advice of the L.A. office was held to estop the Secretary. We noted that:

*** WE summarized these prior decisions in Lazy FC Ranch by saying:

The Moser-Brandt-Schuster line of cases establish the proposition that estoppel is available as a defense against the government if 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 . . . This proposition is true even if the government is acting in a capacity that has traditionally been described as sovereign . . . although we may be more reluctant to estop the government when it is acting in this capacity.

481 F.2d at 989. (Emphasis added.)

* * * * *

* * * Moreover, in the case before us, the Whartons do not claim they are entitled to the land because of the government's acquiescence, laches or failure to act. Rather, they complain of affirmative misconduct on the part of government officials who gave them incorrect information. ^{7/}

(fn. 6 (continued))

"Not every form of official misinformation will be considered sufficient to estop the government (citation omitted). Yet some forms of erroneous advice are so closely connected to the basic fairness of the administrative decision making process that the government may be estopped from disavowing the misstatement."

427 F.2d at 56.

^{7/} This court in [United States v.] Cappaert [508 F.2d 313 (9th Cir. 1974)] cited Beaver v. United States, 350 F.2d 4 (9th Cir. 1965), for the rule that estoppel may not be invoked against the government. In Beaver we said only that the government could not be estopped from asserting title to land simply because it had allowed others to possess it. There was no claim of affirmative misconduct on the part of the government.

Further, in Cappaert, this court did not totally preclude the use of estoppel against the government. We said:

The test of estoppel applied in this circuit was outlined in *Georgia-Pacific*, 421 F.2d at 96:

(1) The party to be estopped must know the facts; (2) he must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended; (3) the latter must be ignorant of the true facts; and (4) he must rely on the former's conduct to his injury.

ELEMENTS OF ESTOPPEL

* * * * *

Using the test of estoppel as outlined in *Georgia-Pacific*, *supra*, it is undeniable that all the elements of estoppel have been met. The BLM clearly knew (or should have known) [emphasis added] that the Whartons could still file a desert entry application, and that in the near future a proposed classification would be made which withdrew the land from entry. The BLM had every reason to believe that the Whartons would act on its advice. The Whartons were ignorant of the true facts or they would have filed an application without making inquiry of the BLM. There is no question that they relied to their detriment on the erroneous advice given to them by the BLM. Thus there exist both misleading statements and conduct which would give rise to estoppel between private parties, bringing the Whartons' claim within the exceptions suggested in both *Cappaert* and *Hibi*.

Further, applying the test enunciated by this court in *Lazy FC Ranch*, *supra*, it is clear that estoppel is applicable here. Governmental conduct would work a serious injustice if this family were divested of the home in which they have invested so much of themselves.

fn. 7 (continued)

"Even if the doctrine of estoppel were available against the government, it could not be applied here because there were no misleading statement or conduct that would give rise to an estoppel between private parties."

508 F.2d at 320. (Emphasis added.)

The interest of the public would not be unduly threatened or damaged by invoking estoppel against the government and granting the occupants an opportunity to obtain this small tract of desert land. The public will be damaged to no greater extent now than it would have been had the original entry been completed. [Emphasis added.] To the contrary, the public interest will be served by the addition of the land to the tax rolls once the Whartons have gained title. And, perhaps more importantly, the public has an interest in seeing its government deal carefully, honestly and fairly with its citizens. 8/

8/ See *Union Oil Company v Morton*, 512 F.2d 743, (9th Cir., 1975), footnote 2, for a discussion of the balancing of the public interest against private equities in applying estoppel against the government in cases involving rights to public land.

It will be noted that the Lazy FC Ranch test, as applied in Wharton, imposes, in some respects, a higher standard against the Government than has sometimes been imposed in estoppel cases involving private individuals. See, e.g., discussion in 28 Am. Jur. 2d Estoppel and Waiver § 80, 720-23 (19). However, in private estoppel cases, where there has been an affirmative representation, constructive knowledge of the actual facts, in some jurisdictions, does not prevent a person from relying on estoppel. E.g., *State, ex rel. McKittrick v. Missouri Utilities Co.*, 339 Mo. 385, 96 SW.2d 607 (19).

It seems clear that to hold that appellant has abandoned the 280 mining claims would be a serious injustice under Lazy FC Ranch, and that the public interest would, in no way, be unduly damaged by imposition of the estoppel. This approach would be in accordance with that of the Acting Deputy Solicitor in 84 I.D. 171, 175 (March 9, 1977):

The Secretary is limited in the exercise of this authority only by the rule of estoppel where the application of the corrected interpretation of law threatens to work a serious injustice and if the public's interest would not be unduly damaged by the imposition of estoppel. United States v. Lazy FC Ranch, 481 F.2d 985, 989 (9th Cir. 1973).

The opinion of the Acting Deputy Solicitor cited by majority herein discusses recordation and filings under the Federal Land Policy and Management Act, but does not purport to discuss estoppel. Under FLPMA there was no intention to amend the law of estoppel, as set forth in judicial decisions. Neither in 84 I.D. 188 did the Acting

Deputy Solicitor intend to modify the Lazy FC Ranch test for estoppel referred to at 84 I.D. 175, quoted supra.

The majority opinion herein cites Goldberg v. Weinberger, 546 F.2d 477, 480-81 (2nd Cir. 1976), cert. denied 3/ sub nom. Goldberg v. Califano, 431 U.S. 937 (1977). The Second Circuit took cognizance of Wharton and other Ninth Circuit decisions which applied estoppel against the Government in certain circumstances, but the court stated "we decline to do so here." (Emphasis added.) In Goldberg, plaintiff had remarried after being incorrectly informed that a remarriage before the age 60 would not cause her to lose her Social Security Act widow's benefits. The court referred to the benefit which could accrue from such a remarriage. Plaintiff by her remarriage had intentionally altered her status and thereby had removed herself from the class which Congress intended to receive such benefits. Here there was no intention to alter status by abandonment of the 280 claims. Without a more substantial equity in plaintiff's favor, the remainder of the discussion in Goldberg is close to being dicta as applied to the facts herein.

I submit that Wharton contains the more complete analysis of the difficult estoppel problem. Under the facts, appellant should not be held to have been misled into abandoning its 280 mining claims. To reword the Wharton holding, quoted supra: BLM should have known the true facts; the interest of the public would not be unduly threatened or damaged by invoking estoppel against the Government and granting the Public Service Co. of Oklahoma an opportunity to make the recordings required under the Federal Land Policy and Management Act of 1976; the public would be damaged thereby to no greater extent than it would have been had the original recordings been completed; the public has an interest in seeing its Government deal carefully, honestly, and fairly with its citizens.

3/ A Supreme Court denial of certiorari is of course not a ruling on the circuit court statement of the law. As stated in The Poster Exchange, Inc. v. National Screen Service Corp., 362 F.2d 571, 574 (5th Cir. 1966):

"Nor is it true, as urged by defendant, that the Supreme Court's denial of certiorari in Vogelstein is in any sense a legal "determination" in favor of the view of the Third Circuit. In the words of the Court:

"a denial of certiorari means only that, for one reason or another which is seldom disclosed, and not infrequently for conflicting reasons which may have nothing to do with the merits and certainly may have nothing to do with any view of the merits taken by a majority of the Court, there were not four members of the Court who thought the case should be heard.' Brown V. Allen, 344 U.S. 443, 492 * * * (1953) * * *."

Even if the Ninth Circuit Wharton approach should, at some point, be modified by the Supreme Court, I would expect that the courts would be fairly liberal in estoppel matters involving a right specifically granted by Congress, which is "presumed" to have been abandoned.

Joseph W. Goss
Administrative Judge

