

EDWARD L. ELLIS AND STEVE R. ELLIS

IBLA 78-593

Decided August 8, 1979

Appeal from a decision of the Alaska State Office, Bureau of Land Management, dated July 18, 1978, declaring null and void ab initio three placer mining claims. AA 14224, AA 16713.

Affirmed.

1. Estoppel

The elements of an estoppel are the following: (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.

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.

Estoppel of the Government is an extraordinary remedy, especially as it relates to public lands, and is to be applied with the greatest care and circumspection.

APPEARANCES: William B. Murray, Esq., Portland, Oregon, for appellants; Jim Kauble, Esq., U.S. Department of Agriculture.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

Edward L. Ellis and Steve R. Ellis appeal from a decision of the Alaska State Office, Bureau of Land Management (BLM), dated July 18, 1978, declaring null and void *ab initio* the Crescent Fraction placer mining claim and portions of the Crescent Discovery and the #1 Above Crescent placer mining claims.

On May 5, 1974, appellants posted a notice of location for the Crescent Discovery placer mining claim and on June 3, 1974, posted notices of location for the #1 Above Crescent and Crescent Fraction placer mining claims. Each of the three claims was recorded on August 2, 1974, in the Seward Recording District. In addition, the #1 Above Crescent claim was recorded with BLM on September 2, 1977.

Thereafter, appellants sought to record Notices of Location for the Crescent Fraction and Crescent Discovery claims with BLM. By its decision of July 18, 1978, BLM rejected recordation of these claims and declared null and void *ab initio* the Crescent Fraction claim and portions of the Crescent Discovery and #1 Above Crescent claims.

In support of its decision, BLM relies upon PLO No. 829, which withdrew a portion of the land in sec. 29, T. 5 N., R. 2 W., Seward meridian "from all forms of appropriation under the public land laws, including the mining laws but not the mineral leasing laws, and reserved for use by the Forest Service, Department of Agriculture, as administrative sites, recreation areas, or for other public purposes as indicated." The effective date of this withdrawal is May 22, 1952, some 22 years prior to appellants' posting of location notices.

On April 6, 1978, the U.S. Forest Service determined that the Crescent Fraction and portions of the Crescent Discovery and #1 Above Crescent mining claims were within the area withdrawn by PLO No. 829. BLM relied upon this finding in its decision of July 18, 1978, in finding the above claims null and void:

It is well established that a mining claim located on land withdrawn from mineral entry is null and void *ab initio* and is properly declared so when, at the time of location, the land was not open to mineral entry (Ralph Page, 2 IBLA 262, 78 I.D. 167 (1971); David W. Harper et al., 74 I.D. 141 (1967)).

Appellants do not dispute the logic of BLM's decision, but argue that the Government should be estopped to disavow information provided by BLM and the Forest Service which indicated that appellants' claims were outside the withdrawn area. This charge that the Government be estopped is the sole basis for appeal set forth in the claimants' statement of reasons.

Appellants contend on appeal that they had been assured by an official of the Forest Service that their claims were not within the withdrawn area and therefore could be located as set forth in the location notices. They assert they were further assured that they could rely upon the official land title status map of BLM which at the time showed appellants' claims to be outside the withdrawn area. These assurances were allegedly made prior to appellants' investment of time and money in developing the claims.

Relying upon these assurances, appellants explored further during the 1975 season and filed a letter of intent to mine in January 1976. In response, the Forest Service granted permission to construct a cabin, toolsheds, diversion boxes, recovery units, and other items necessary for mining.

Upon finding gold, appellants decided in the summer of 1976 to bring in a small caterpillar tractor. The Forest Service sent a representative out to examine appellants' operation and to discuss the withdrawal boundary. Appellant, Edward Ellis, was satisfied that the issue of any conflict with the withdrawal was settled insofar as the subject claims were concerned.

Thereafter, however, the Forest Service determined that the withdrawn area was, in fact, invaded by the subject mining claims and that the BLM land title status map was in error. The effect of this error was to include portions of the Crescent Discovery and #1 Above Crescent claims and the entire Crescent Fraction claim in the withdrawn area.

As a result, the land title status map prepared by BLM was corrected on September 6, 1976, to reflect the changes in the boundary of the withdrawn area.

Appellants contend that the Forest Service was unwilling to survey the boundary of the withdrawn area and that they themselves were unable to do so. Hence on January 14, 1977, Edward Ellis accompanied two Forest Service employees as they ran a compass line southeasterly into section 29. The boundary thereby blazed placed a portion of the Crescent Discovery claim, *inter alia*, within the withdrawn area. By appellants' admission, the Crescent Discovery claim is the most valuable claim in the area and is essential to the success of appellants' mining operations which include some 12 other claims.

On March 7, 1977, Edward Ellis requested that a 10.1 acre portion of the area covered by PLO No. 829 be revoked. The Forest Service allegedly responded by saying that appellants' request for revocation would be considered if appellants could show a discovery by autumn of that year.

By a letter dated December 12, 1977, the Forest Service denied appellants' request for revocation on the grounds that appellants had not shown minerals of sufficient value to warrant further development. This conclusion was based upon a mineral examination, conducted by the Forest Service in November 1977, of two sites within the 10.1 acres plot. The Forest Service also acknowledged that Mr. Ellis had not reached bedrock, where gold is commonly concentrated, in either of the sites tested.

Appellants claim that they could recover substantial amounts of gold without causing harm to the land, water, fish, or inhabitants of the area. They argue that the Forest Service and BLM should be estopped to disavow their original statements indicating that all claims were outside the area withdrawn by PLO No. 829. Appellants cite numerous cases in support of their argument.

The cases cited by appellants, however, do not persuade us. We agree with appellants that it is too late in the day to reiterate the traditional rule that estoppel cannot be invoked against the Government. Indeed, this Board has acknowledged the passing of this rule on a number of occasions. United States v. Larsen, 36 IBLA 130 (1978); Henry E. Reeves, 31 IBLA 242 (1977). But we agree with the general conclusion of the Forest Service that the facts do not justify an estoppel in this case.

In United States v. Georgia-Pacific Company, 421 F.2d 92 (9th Cir. 1970), the Ninth Circuit set forth the elements of an 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;
- (4) he must rely on the former's conduct to his injury.

In United States v. Wharton, 514 F.2d 406 (9th Cir. 1975), the first requirement that a party to be estopped must know the facts was interpreted to include those situations where the party to be estopped should have known the facts giving rise to the estoppel. 514 F.2d at 413. Such an interpretation is contrary to the position advanced by the Forest Service in its Reply to Mining Claimants' Reasons for Appeal. This broadening of the first element is important to appellants, who do not allege any intentional misrepresentations by the Government.

In United States v. Lazy FC Ranch, 481 F.2d 985, 989 (9th Cir. 1973), the court included an additional test which was later approved by Wharton:

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.

Assuming arguendo that the four elements set forth in Georgia-Pacific are present in the given facts, appellants have not demonstrated that they would suffer a serious injustice as a result of the alleged Government misinformation and have further failed to demonstrate that the public interest would not be unduly damaged by imposition of estoppel.

We note that in no case cited by appellants was the Government estopped to declare null and void a mining claim located on withdrawn land.

The facts in the Wharton case, supra, bear a certain resemblance to those of the present case. Therein, John Wharton approached Government officials in 1966 to determine what his family could do to gain title to land which they had entered in 1919 under the Desert-Land Entry Act of 1877. BLM answered that there was nothing the Whartons could do, when in fact it was still possible to file an application for patent under the homesteading laws. ^{1/} In May 1967, BLM reclassified the land making it impossible to obtain new desert land entries. Thereafter, the Government sued for ejection of the Whartons.

The Ninth Circuit found that the Government had given misleading advice to the Whartons and further found that ejection would work an injustice far greater than any damage done to the Government. Indeed, the court found that the Government would be aided by allowing the Whartons to apply for patent, since this would likely add another taxpayer to the property tax rolls. The Government was, therefore, estopped to claim that the Whartons application for patent was untimely and was ordered to entertain an application for patent.

The effect of the Wharton decision was to give to the Whartons the opportunity to patent land which prior to BLM's misleading advice was open to entry. The Government was required to correct an error which would have denied to the Whartons the exercise of this right.

In the present case, however, appellants ask that they be given a right to mine an area which has been closed to mining since 1952, some

^{1/} The Court of Appeals for the Ninth Circuit stated that the Whartons could also have filed an application for patent under the Desert Land Entry Act. 514 F.2d at 408. This option was not in fact available, because water had previously been conveyed to the subject land. 43 U.S.C. § 322 (1976).

22 years prior to appellants' entry thereon. Hence, appellants are asking that they be given a right which would have been denied to all others regardless of BLM's misleading advice. Wharton cannot be read to authorize such an action.

Appellants also cite Brandt v. Hickel, 427 F.2d 53 (9th Cir. 1970), wherein the Government was estopped to deny misleading advice to an oil and gas offeror. In Brandt, the offeror was misled to believe that she would not lose her first priority in an oil and gas lease drawing while she corrected certain information in her offer. Following this misinformation, a second offer was submitted by one Hansen for the identical parcel of property, but this offer was rejected in favor of the Brandt offer. On Hansen's appeal to the Secretary of the Interior, the Secretary reversed and held that BLM had no authority to give the Brandt offer priority over the Hansen offer.

On appeal to the Ninth Circuit, the court held that BLM was estopped to disavow its misleading advice to Mrs. Brandt. The court concluded: "Bad advice cannot ordinarily justify giving away to individuals valuable government assets. This is no such case." At 57.

As in the Wharton case, the effect of the estoppel against the Government was to permit the exercise of a right which was available to the general public, *i.e.*, the right to lease public land open for oil and gas exploration. Appellants here, however, assert a right to locate a claim on withdrawn land, a right which is wholly unavailable to the general public. Brandt gives no support to appellants' argument.

Appellants cite a number of cases for the proposition that the Government can be estopped: Hoeber v. District of Columbia Redev. Land Agency, 412 F. Supp. 211 (D.D.C. 1976); Union Oil Co. of California v. Morton, 512 F.2d 743 (9th Cir. 1975); United States v. Wharton, *supra*; United States v. Lazy FC Ranch, *supra*; United States v. Georgia-Pacific Company, *supra*; Brandt v. Hickel, *supra*; United States v. Certain Lands in San Diego County, State of California, 214 F. Supp. 44 (S.D. Cal. 1963); Schuster v. C.I.R., 312 F.2d 311 (9th Cir. 1962); Moser v. United States, 341 U.S. 41 (1951).

No case cited by appellants persuades us that the Government is required to open an area which has been withdrawn by the Secretary of the Interior. In both Schuster and Lazy FC Ranch, arguably appellants' strongest cases, the Government was scarcely damaged by imposition of estoppel. No case cited by appellants subjects the Government to the damage which it would incur by imposition of an estoppel in the instant case.

This Board is not unmindful of the money and time which appellants have spent in working their claims. Although the statement of

reasons is silent as to how much expense appellants have incurred, considerable energy has been devoted to the various claim sites. The statement of reasons is similarly silent as to how much income appellants might have earned. It should be noted that appellants have 13 claim sites adjacent to one another and that BLM's decision affects one in its entirety and two partially. Although alleging that the Crescent Discovery claim is "the most valuable portion of the mining operation and an area essential for the operation of the additional ground farther upstream on Crescent Creek," appellants provide no basis for this conclusion.

Appellants have not shown that a serious injustice would result if 3 of 13 claims were to be affected by BLM's decision of July 18, 1978. On the other hand, the Government is precluded from using the claim site for the purposes of PLO No. 829 if estoppel were to be invoked. On the basis of the test set forth in United States v. Lazy FC Ranch, supra, we hold that appellants have not shown the requisite elements for invoking estoppel against the Government.

Our holding is consistent with a number of cases decided by this Board. For example, in Roland Oswald, 35 IBLA 79 (1978), we stated: "This Board has specifically held that it would greatly harm the public interest to divest by estoppel the Government of title to lands which were never patented, and to which patent was never earned under the public land laws."

In Arthur W. Boone, 32 IBLA 305, 308 (1977), we held:

The fact that a mining claimant has held a claim for many years and performed work on the claim does not, by itself, create any rights against the Government which will estop the Government from determining the validity of the claim. . . . It is incumbent upon the locator of a mining claim to exercise considerable care in ascertaining the status of the land embraced in the claim and the limitations upon his rights as the holder of an unpatented mining claim. . . . (Reliance on open status of land is unreasonable and, hence, estoppel will not lie where details of effect of withdrawal were available upon inquiry at the local land office). Failure of a Government employee to advise appellant that the land embraced in the mining claims was closed to mining location cannot give life to invalid claims. [Citations omitted.]

We agree with the district court in United States v. Eaton Shale Co., 433 F. Supp. 1256, 1272 (D. Colo. 1977): "The court is not unmindful that estoppel of the government is an extraordinary remedy, especially as it relates to public lands, and is to be applied with the greatest care and circumspection."

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.

Douglas E. Henriques
Administrative Judge

We concur:

Frederick Fishman
Administrative Judge

Newton Frishberg
Chief Administrative Judge

