

ROYAL HARRIS

IBLA 79-448

Decided January 17, 1980

Appeal from determination of the Alaska State Office, Bureau of Land Management, denying application for townsite lot 2564.

Affirmed.

1. Federal Land Policy and Management Act of 1976: Generally --
Federal Land Policy and Management Act of 1976: Repealers --
Townsites

The townsite laws were repealed by sec. 703 of the Federal Land Policy and Management Act of 1976 (FLPMA), 90 Stat. 2790, and the initiation of an occupancy claim pursuant to any of the repealed laws after the effective date of FLPMA, Oct. 21, 1976, does not constitute a valid existing right which would survive FLPMA.

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

The general rule is that reliance on erroneous or incomplete information provided by Federal employees cannot create any rights not authorized by law.

3. Estoppel

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 extra-ordinary remedy, especially as it relates

to public lands, and is to be applied with the greatest care and circumspection.

APPEARANCES: Tim MacMillan, Esq., Josephsen, Trickey, & Lorensen, Inc., Anchorage, Alaska, for appellant. John M. Allen, Esq., Regional Solicitor, Anchorage, Alaska, for Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE FISHMAN

On May 9, 1977, appellant herein wrote to George E. M. Gustafson, Townsite Trustee, Anchorage, Alaska, expressing the hope to build a small frame structure on the Kotzebue Townsite Addition. Appellant inquired of the trustee whether it would be "legal" to begin construction during the summer of 1977. By letter dated May 17, 1977, the trustee replied as follows:

It appears you have staked a site in unsubdivided portion of Tract "B", U.S. Survey 4498. This is entirely legal. You may proceed with your building plans. Before title, in the form of a Trustee Deed, can be granted, the Bureau of Land Management must make a subdivisional survey and have the plat of survey approved in Washington, D.C.

However, on March 15, 1979, the trustee wrote appellant as follows:

Dear Mr. Harris:

I am attaching an opinion which I just received from the Regional Solicitor of the Department of the Interior.

In it he concludes that persons whose occupancy of unsubdivided townsite lands commenced after October 21, 1976, cannot claim the land under the Townsite Laws.

Land within your townsite which was unsubdivided and unoccupied on October 21, 1976 will become available, if the village requests it to be deeded to the municipal corporation as soon as the land can be surveyed. If there is no municipal corporation I will continue to hold the land in trust until either a municipal corporation is created or until Congress authorizes me to convey it to the State in trust for the village.

In the meantime both incorporated and unincorporated municipalities can use the land for municipal purposes.

There may be situations in which people who entered the land after October 21, 1976, have spent money constructing buildings or working other improvements in the belief

that the land was still open, a belief which I shared until receiving the attached opinion. Now that it has been determined that the municipality is entitled to townsite lands which were unsubdivided and unoccupied on October 21, 1976, the municipality is in the best position to deal fairly with occupants who came onto the lands after that date.

The March 15, 1979, letter is the instrument appealed from herein. The Regional Solicitor's memorandum referred to therein reviewed the effect of the repeal of the townsite laws by the Federal Land Policy and Management Act (FLPMA), 43 U.S.C. § 1701 (1976).

Appellant asserts on appeal that he expended considerable resources in partially constructing a residence on the site. His affidavit indicates that he spent in excess of \$1,500 on building materials. His major contention is that BLM is estopped from denying the validity of his claim under the townsite laws. He asserts that the requisite elements of estoppel, present herein, are: (1) misrepresentation by the townsite trustee; (2) absence of contrary knowledge on part of claimant; (3) actual reliance; (4) detriment; and (5) factual context in which absence of equitable relief would be unconscionable. Appellant asserts further that he will suffer substantial detriment if he chooses either to salvage the materials on the site or bring suit against the City of Kotzebue for the enhanced value of the site. Although he concedes that FLPMA repealed the townsite laws, appellant maintains that the rights of individuals, to acquire lands in segregated townsites, were preserved.

The Regional Solicitor's answer reviews the effect of FLPMA on the townsite laws and concludes that appellant has no claim thereunder. The Solicitor also argues that the elements necessary for an estoppel are not present in the case before us.

[1, 2] We will first consider the applicability of FLPMA. It is not clear from the file under what statutory authority appellant first initiated his claim. One of the townsite statutes was the Act of May 25, 1926, 44 Stat. 629, 43 U.S.C. §§ 733-36 (1970), which allowed Alaska Natives to obtain townsite lots. This statute, as well as the other townsite laws, was repealed by section 703 of FLPMA, 90 Stat. 2790. The question then becomes whether appellant has a valid existing right under section 701 of FLPMA, which provides that nothing in the Act shall be construed as terminating any patent, or other land use right or authorization existing on the date of approval of the Act (Oct. 21, 1976). The events giving rise to this appeal postdate the effective date of the Act. Therefore, on October 21, 1976, appellant could have had no valid existing right which would survive FLPMA. Stu Mach, 43 IBLA 306 (1979). When appellant wrote to BLM on May 9, 1977, he had only a hope or expectancy. However, use or occupancy of the public land granted subsequent to the effective date of FLPMA must be under authority of that Act, 43 U.S.C. § 1732(b) (1976); William J.

Coleman, 40 IBLA 180 (1979), and the erroneous advice provided by BLM could create no rights not authorized by law. Belton E. Hall, 33 IBLA 349 (1978).

[3] The elements of estoppel were recently discussed in Edward L. Ellis, 42 IBLA 66 (1979). We had reference therein to United States v. Wharton, 514 F.2d 406 (9th Cir. 1975), cited by both parties in the case before us. We will again recite the facts in Wharton: In 1966 John Wharton inquired of Government officials 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 advised that there was nothing the Whartons could do, when in fact, it was still possible to file an application for patent under the homestead laws. In May 1967, BLM reclassified the land, making it impossible to obtain new desert land entries. Subsequently, the Government sued for ejectment of the Whartons. The import of the Wharton case was discussed in Ellis, supra, as follows:

The Ninth Circuit found that the Government had given misleading advice to the Whartons and further found that ejectment would work an injustice far greater than any damage done to the Government. * * * 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. [Emphasis supplied.]

In Wharton, the appellant was denied, by virtue of the Government's misleading advice, the exercise of a right available to the general public, i.e., the right to apply for land under the homestead laws. In the case at bar, however, the appellant seeks to exercise a right not available to the public because of the repeal of the laws under which that right could formerly be asserted. The right claimed by appellant did not exist when he claimed it and cannot be called into being by reliance on BLM's erroneous advice.

It is well settled law that the Department can alienate interests in land belonging to the United States only within the limits authorized by law. Union Oil Co. of California v. Morton, 512 F.2d 743, 748 (9th Cir. 1975).

William J. Elder and Stephen M. Owen, 56 Comp. Gen. 85, 89 (1976), illuminates the principle above as follows:

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)

We sympathize with appellant's expenditures of means and materials toward building a structure. Appellant has not shown, however, that a serious injustice necessarily would result if he cannot lay

claim to the site. The letter appealed from suggests that one possible remedy lies with the municipality. Two other possible courses of remedial action are referred to in appellant's own statement of reasons.

In view of our findings, it is unnecessary to discuss the remaining elements of estoppel. Under the authorities considered, the appellant has not shown, and the appeal does not contain, the requisite elements for invoking that remedy against the United States. As we stated in Ellis, supra at 72:

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 matter appealed from is affirmed.

Frederick Fishman
Administrative Judge

We concur:

Newton Frishberg
Chief Administrative Judge

Edward W. Stuebing
Administrative Judge

Douglas E. Henriques
Administrative Judge

Joseph W. Goss
Administrative Judge

ADMINISTRATIVE JUDGE BURSKI DISSENTING:

The majority decision holds that the repeal of the townsite laws applicable in Alaska (see section 11 of the Act of March 3, 1891, 26 Stat. 629, 43 U.S.C. § 732 (1970), and the Act of May 25, 1926, 44 Stat. 629, 43 U.S.C. §§ 733-736 (1970)) by section 703 of the Federal Land Policy and Management Act of 1976 (FLPMA), 90 Stat. 270, precludes the initiation of rights by settlement subsequent to the passage of the repeal. While I admit that there is clearly room to disagree as to the effect of the repeal on subsequent settlers of land within a townsite, I am persuaded that the recognition of the rights of such settlers more clearly accords with past actions with respect to the townsite laws.

The basic rationale of the majority decision coincides with that set forth in the February 20, 1979, memorandum from the Regional Solicitor, Alaska, to the Townsite Trustee. In that memorandum, the Regional Solicitor reviewed the townsite laws and the regulations which had been issued pursuant thereto. The memorandum noted:

The regulations promulgated pursuant to the 1926 legislation were supplemental to the regulations implementing the earlier act. [City of Klawock v. Gustafson, D. Alaska, Civ. No. K74-2, unreported oral opinion Nov. 11, 1976.] Generally, the scheme they established for the segregation and disposition of public lands as townsites is as follows: A group of residents files a petition with the Interior Department that a Federal townsite be established and surveyed. The petition is noted on the public land records and thereby segregates the land. The Townsite Trustee after consulting with the village council prepares a plan of survey. The survey is done, a plat prepared and officially approved. The initial plat shows the exterior boundaries of the townsite and the subdivisional boundaries of the occupied portion. Unoccupied portions are sometimes labeled "unsubdivided," sometimes simply shows as a lettered tract - with no lots indicated. The date of subdivisional survey is critical. Up to that date rights to land within the townsite can be acquired simply by occupancy. Upon survey approval the Trustee applies for patent to the land within the exterior boundaries as shown on the plat. When patent is received the Trustee proceeds to make lot awards, collecting (from non-Natives only) a pro rata share of the survey cost. As unsubdivided tracts become occupied successive subdivisional surveys and, upon approval, additional lot awards may be made. Lots which are unoccupied on the date of subdivisional survey approval may be sold at public auction, with the proceeds going to the municipality. Lots not sold at auction are deeded to the municipality. If

the municipality objects to a public auction all unoccupied lots may be deeded to the city. [Emphasis supplied; footnote omitted.]

Memorandum at 2.

The Regional Solicitor also noted that subsequent to the issuance of Public Land Order (PLO) No. 4582, 34 FR 1025 (Jan. 23, 1969), "[W]ith minor exceptions the only land in Alaska open to non-mineral entry after 1971 was in pending townsites, most of which were in Native villages." Memorandum at 3. In a discussion on the applicability of the provisions of the Alaska Native Claims Settlement Act (ANCSA), 85 Stat. 688, 43 U.S.C. §§ 1601-1630 (1976), to lands within a townsite the Regional Solicitor stated:

At the moment the land is segregated for disposal under the townsite laws, occupants of the segregated land acquire certain rights under the Department's regulations (43 CFR Parts 2564 and 2565) which, in time, will lead to the acquisition of title. Land that is unoccupied when the segregation takes effect is open to occupancy until the date of subdivisional survey approval. If still unoccupied at that date the land can be acquired by the municipality. All of the land within the segregated townsite is therefore covered by preexisting rights - held by either individual occupants or the municipality itself. Accordingly none of the Land within the exterior boundaries is available for selection under ANCSA.

Memorandum at 4.

Turning to the repeal of the townsite laws by section 703 of FLPMA, the Regional Solicitor differentiated between the provisions of ANCSA and the effect of the repeal. The effect of the repeal by FLPMA, in the opinion of the Regional Solicitor, was to prohibit the initiation of new occupancy claims within a townsite. Thus, "[T]he rights in existence on the date of repeal were the rights of individuals then in occupancy and the rights of the municipality to any unoccupied lands. Persons not in occupancy on that date had no rights 'existing on the date of approval of this Act.' Therefore, the repeal in effect closed all townsites to further entry." Memorandum at 4.

Finally, the Regional Solicitor examined the question as to why, if the 1976 repeal terminated the ability of individuals to establish occupancy rights within existing townsites, the 1971 ANCSA withdrawal, which also protected "valid existing rights," did not have the same effect:

The answer is that "new occupancy claims" were not the valid existing rights which under ANCSA excluded unoccupied townsite lands from Native selection. The existing

claims which protected the townsites were the rights of existing occupants and the right of the municipality to unoccupied lands. Since ANCSA did not repeal the townsite law, the municipalities' right which saved the unoccupied lands from being withdrawn by ANCSA, was itself subject to being preempted by an individual occupant until the date of subdivisional survey approval. The repeal of the townsite laws has a very different effect than the ANCSA withdrawal in that the repeal terminates the authority under which rights can be acquired. Only rights already acquired are protected from the repeal. [Emphasis in original.]

Memorandum at 5.

I have quoted from the Regional Solicitor's memorandum at considerable length because, even though I disagree with the conclusions reached therein, I feel it provides the essential framework within which the issue presented by this appeal must be examined.

The key determinant is the realization that, until the final subdivisional survey, neither the occupants nor the municipality had any vested right to any specific parcel of land within a townsite. The applicable regulations clearly provided that rights are determined as of the date of the final subdivisional survey. See 43 CFR 2565.3(c); Ruth B. Sandvik, 26 IBLA 97 (1976). These provisions apply regardless of whether the townsite is a Native or non-Native townsite. See City of Klawock v. Andrew, 24 IBLA 85, 83 I.D. 47 (1976), aff'd, City of Klawock v. Gustafson, supra. Settlement after the final subdivisional survey afforded the occupants no rights. Richard Whittaker, 16 IBLA 12, 16 (1974). Similarly, an occupant who had settled in a townsite but who had moved elsewhere prior to the final subdivisional survey acquired no rights upon survey. Ethel and Bernard Vogen, A-28835 (May 10, 1962).

By the same token, the rights of the municipality to the unoccupied lots vest only upon the final subdivisional survey. Thus, in Ruth B. Sandvik, supra, the Board held that the rights of a municipality are clearly subordinate to the superior claim established by any individual who settles and occupies the land prior to subdivisional survey. Therein, the Board held:

[T]he townsite regulations do not treat a municipality differently from an individual insofar as rights prior to approval of final subdivisional survey are concerned. * * * We cannot so derogate the purpose of the townsite laws that townsite lots are open to be settled on and improved until final subdivision survey, and that rights to the lots can only be so acquired. [Emphasis in original.]

26 IBLA at 99-100. In City of Klawock, *supra*, the Board stated: "The City may have a claim to title to all unoccupied lands, but occupancy must be determined as of the date of final subdivisional survey." 24 IBLA at 93, n.5, 83 I.D. at 53, n.5.

I would also note that the Ninth Circuit Court of Appeals, in a matter growing out of the Board's decision in City of Klawock, *supra*, stated:

The district court, on the other hand, stated that the Native Townsite Act did not preclude the trustee from disposing of unoccupied lots in native townsites as he would in other townsites. Under the regulations, the district court said, "the City is eligible to receive deeds to the unoccupied and unsold lots within the Klawock townsite and to receive the economic benefits of the lots that are sold by competitive bidding." [Emphasis supplied.]

City of Klawock v. Gustafson, 585 F.2d 428, 430 (1978).

The mere fact that an individual was in possession of land within a townsite on a date prior to final subdivisional survey did not mean that the individual had a right to the land since the right to the land would only vest if the occupancy existed on the date of final subdivisional survey. The individual was not clothed with a right, but rather with an expectation of a right. Similarly, while the municipality had an expectation that it would receive any lands which were unoccupied at the time of subdivisional survey, its claim to any specific parcel, absent an affirmative appropriation by the municipality, was clearly a contingency until the final subdivisional survey occurred.

If the date of the repeal of the townsite laws is determinative of all rights within a townsite, I submit that should it develop that land which was occupied by an individual claimant as of the date of repeal is subsequently unoccupied as of the date of final subdivisional survey, the municipality would have no claim to that land since at the time of the repeal it had no right thereto. The only other internally consistent interpretations are (1) that the municipality received an eo instante grant of all land unoccupied at the time of repeal in addition to a contingent claim to all lands occupied at repeal (the contingency occurring if the land was unoccupied at final subdivisional survey), or (2) both the individual occupants and the municipality were awarded an eo instante grant of all land occupied or unoccupied, respectively, on the date of repeal, with the final subdivisional survey a matter of no further consequence.

All of the above possibilities suffer from the same infirmity: they assume that the repeal not only terminated the ability of localities to initiate a townsite claim, but that it also substantively

changed the method of adjudication of rights within existing townsites. While the legislative history on this question is scarcely detailed, there is no support for the proposition that a radical change was intended in the administration of existing townsites. In H.R. Rep. No. 94-1163, 94th Cong., 2d Sess., the need for the repeal of the townsite laws was discussed:

Modern urban development requires better planning than the townsite laws which provide for haphazard location and establishment of cities or towns with obsolete provisions for size of towns, townlots, etc. There has been practically no use of these laws outside of Alaska for many years. The bill would allow for transfer of lands for the same purposes as the townsite laws, but with more adequate provision for land use planning, and protection of the public interest.

H.R. Rep. No. 94-1163 at 25.

While it is clear that Congress felt that the existing townsite statutes were outmoded and inadequate for modern problems, there is no indication of a desire that the then existing procedures concerning the award of lands within established townsites should also be immediately changed. I think it is far more consistent with Congressional intent to interpret the repeal of the townsite laws as prohibiting the establishment of any new townsites, but permitting those townsites which had been established to be administered under the prior procedures, and I would so hold.

Finally, I would note that FLPMA protects not only "valid existing rights," but also provided that "[n]othing in this Act, or in any amendment made by this Act, shall be construed as terminating any valid lease, permit, patent, right-of-way, or other land use right or authorization existing on the date of approval of this Act." Section 701(a) of FLPMA, 43 U.S.C. § 1701 (1976). I submit that every citizen of the United States was vested with a right to settle and occupy land within a townsite prior to final subdivisional survey, and that this right was in existence as of the date of the approval of FLPMA. I believe that this provision is more than a sufficient predicate upon which to base a finding that appellant's settlement was not contrary to the law, particularly in the absence of a clear Congressional intent to alter the administration of existing townsites.

Since it is my view that the repeal of the townsite laws did not vitiate the procedures under which existing townsites are administered, I dissent from the decision of the majority.

James L. Burski
Administrative Judge

We concur:

Joan B. Thompson
Administrative Judge

Anne Poindexter Lewis
Administrative Judge

