

ARPEE JONES ET AL.

IBLA 81-684, etc.

Decided January 18, 1982

Appeal from decisions of Nevada State Office, Bureau of Land Management, rejecting desert land applications (N-22360, etc.).

Affirmed.

1. Desert Land Entry: Lands Subject to--Oil Shale:
Withdrawals--Withdrawals and Reservations: Generally

Lands which are known to be underlain by deposits of oil shale are withdrawn from desert land entry by Exec. Order No. 5327 (Apr. 15, 1930), and a desert land application for such lands is properly rejected.

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

Equitable estoppel against the Government will not lie where there has been no affirmative misconduct by an authorized agent or officer resulting in a misrepresentation of material fact upon which a person was led to rely to his or her ultimate detriment.

APPEARANCES: Dirk A. Fulton, Esq., Oakland, California, for appellants.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

Arpee Jones and the appellants listed in the appendix appeal from decisions of the Nevada State Office issued in April 1981 rejecting their desert land applications because the lands applied for are within the Elko oil shale withdrawal which segregates the lands from all forms

of entry including the agricultural land laws. The land was withdrawn by Exec. Order No. 5327 on April 15, 1930, pursuant to the Act of June 25, 1910 (36 Stat. 847), as amended by the Act of August 24, 1912 (37 Stat. 497), 43 U.S.C. § 141, 142 (1976). Appellants' applications for desert land entries were filed in March and July 1979 under the Desert Land Act, 43 U.S.C. § 321 (1976).

On appeal appellants contend that prior to the filing of their applications they made a careful and diligent search of the public records to determine if the lands were available for desert land entries. They assert that rejection of their applications was arbitrary and capricious as there was no public record of the oil shale withdrawal when the applications were filed; that Executive orders are of no force and effect unless they are published or the party has actual knowledge of them; that Exec. Order No. 5327 was issued on April 15, 1930, prior to the requirement of publication in the Federal Register; that publication of withdrawals occurring prior to the Federal Register Act of July 26, 1935, as amended, 44 U.S.C. § 1505 (1976), was most commonly accomplished by making the withdrawal "of record" in the local land office; that Exec. Order No. 5327 was not "of record" at the Nevada Land Office until August 1979, subsequent to the time they filed their applications.

Appellants also contend that BLM is equitably estopped from rejecting their applications on the ground of the withdrawal created by the unpublished 1930 Executive order. Appellants explain that BLM's acceptance of the applications and filing fees, its correspondence indicating that the applications were in good order, and its failure to advise them of the withdrawal order over a 25-month review period combine to estop BLM from asserting the unpublished order as a ground for rejecting the applications. Appellants add that BLM maintained inadequate records, misrepresented the status of the land, and induced appellants to spend in excess of \$6,000 each in furtherance of the processing of their applications.

[1] Lands which are known to be underlain by deposits of oil shale are withdrawn from desert land entry by Exec. Order No. 5327 of April 15, 1930, until modified or revoked by another Executive order or an act of Congress, and a desert land application for such land is properly rejected. Dale J. Merrell, A-30527 (May 20, 1966). See Mecham v. Udall, 369 F.2d 1 (10th Cir. 1966). Appellants are not entitled to a reversal of the decision below because reliance upon records maintained by the land offices cannot operate to vest any right not authorized by law. 43 CFR 1810.3(c); see Immigration & Naturalization Service v. Hibi, 414 U.S. 5, 8 (1973); Utah Power and Light Co. v. United States, 243 U.S. 389, 409 (1917). Appellants also assert that the withdrawal is invalid because of a lack of publication of the Executive order; however, the court in Mecham v. Udall, supra at 3, expressly upheld the validity of Executive Order No. 5327. Therefore, while it was unfortunate for appellants that the BLM land office records at the time

the applications were filed did not reflect the withdrawal, that fact cannot operate to vitiate the withdrawal.

[2] Appellants claim that BLM should be estopped to reject their applications because it accepted appellants' applications and filing fees and did not advise them of the withdrawal order.

Equitable estoppel will not operate to bar an action to reject an application where it is not shown that some officer of the Government, who was authorized to approve the application falsely represented material facts to the applicants concerning the status of the land or concealed material facts from them with the intention that they should act in reliance thereon, with the result that they were induced to do so, to their ultimate damage. See Dorothy Smith, 39 IBLA 306 (1979); United States v. Larsen, 36 IBLA 130, 133 (1978); United States v. Johnson, 23 IBLA 349, 355-56 (1976); see also Schweiker v. Hansen, 450 U.S. 785 (1981). BLM did nothing which expressly indicated that the land was available for entry and nothing in the record suggests that by its inaction, BLM was deliberately fostering this mistaken impression. While appellant may have presumed that BLM's failure to say otherwise meant that the land was available for entry, it does not appear that BLM indulged in any affirmative misconduct. Also, the fact that BLM accepted appellants' applications and the filing fees does not change the result. Acceptance of an application and filing fee does not create an estoppel so as to preclude BLM from subsequently rejecting the application because the land requested had been previously withdrawn from entry. See Margaret E. Peterson, 55 IBLA 136 (1981).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are affirmed.

Bruce R. Harris
Administrative Judge

We concur:

Anne Poindexter Lewis
Administrative Judge

Gail M. Frazier
Administrative Judge

APPENDIX

<u>Appeal Number</u>	<u>Applicant and Serial Number</u>	<u>Legal Description</u>		
IBLA 81-684	Arpee Jones (N-22360)	SW 1/4 NW 1/4, W 1/2 SW 1/4 sec. 4, and SE 1/4, E 1/2 E 1/2 SW 1/4 sec. 5, T. 33 N., R. 56 E., Mount Diablo meridian.		
IBLA 81-685	Anita M. Carter	N 1/2 sec. 5, T. 33 N., R. 56 E., Diablo meridian.	(N-22357)	Mount
IBLA 81-686	Estate of Keith R. Jones (N-25390)	W 1/2 NE 1/4 sec. 24, T. 34 N., R. 55 E., Mount Diablo meridian, and the NW 1/4 NW 1/4, NE 1/4 NW 1/4, SE 1/4 NW 1/4, NW 1/4 NE 1/4 sec. 4, W 1/2 E 1/2 SW 1/4, E 1/2 W 1/2 SW 1/4 sec. 5, T. 33 N., R. 56 E., Mount Diablo meridian.		
IBLA 81-687	David L. Arrillaga	N 1/2 NE 1/4, N 1/2 NW 1/4, 1/4 NW 1/4, N 1/2 SE 1/4 NW 1/4, sec. 8 and E 1/2 NE 1/4 NE 1/4, SE 1/4 NE 1/4, NE 1/4 SE 1/4 sec. 7, T. 33 N., R. 56 E., Mount Diablo meridian.	(N-22847)	SW
IBLA 81-688	Walter B. Carter	S 1/2 sec. 32, T. 34 N., R. 56 E., Diablo meridian.	(N-22358)	Mount

