

Appeal from a decision of the Fairbanks, Alaska, District Office, Bureau of Land Management, declaring placer mining claims abandoned and void. F-44987 through F-44990, F-44992.

Affirmed.

1. Federal Land Policy and Management Act of 1976: Recordation of Affidavit of Assessment Work or Notice of Intention to Hold Mining Claim -- Federal Land Policy and Management Act of 1976: Recordation of Mining Claims and Abandonment -- Mining Claims: Abandonment

In the case of a mining claim located prior to Oct. 21, 1976, the failure to file one of the instruments required by sec. 314(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(a) (1982), on or before Oct. 22, 1979, and prior to Dec. 31 of every year thereafter in the proper BLM office conclusively constitutes abandonment of the mining claim by the owner and renders the claim void.

2. Federal Employees and Officers: Authority to Bind Government

Reliance on erroneous information provided by a BLM employee cannot relieve the owner of an unpatented mining claim of an obligation imposed by statute, create rights not authorized by law, or relieve the claimant of the consequences imposed by the statute for failure to comply with its requirements.

APPEARANCES: Steve E. Cate, pro se.

OPINION BY ADMINISTRATIVE JUDGE FRAZIER

Steve E. Cate has appealed from a decision of the Fairbanks, Alaska, District Office, Bureau of Land Management (BLM), dated January 20, 1984,

which declared five placer mining claims 1/ abandoned and void for failure to file either evidence of annual assessment work or a notice of intention to hold the claims for the year 1982, as required by section 314 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1744 (1982).

Appellant's mining claims were located prior to October 21, 1976. Pursuant to section 314 of FLPMA, a copy of the notice of location and either evidence of annual assessment work or a notice of intention to hold the claims was required to be filed on or before October 22, 1979. See 43 U.S.C. § 1744(a) and (b) (1982). Additionally, proof of labor or notice of intention to hold is required to be filed prior to December 31 of each year thereafter. 43 U.S.C. § 1744(a) (1982). Certificates of location for the claims were recorded with BLM on November 14, 1978. The necessary proofs of labor were filed timely with BLM in 1979, 1980, and 1981. However, the record contains neither an affidavit of annual assessment work nor a notice of intention to hold the claims filed in 1982.

In a statement submitted to this Board after appellant filed his notice of appeal he essentially raises an estoppel defense. That statement prepared by James Clayton 2/ asserts:

In 1982 I went to the BLM office in Fairbanks to record the claims, a secretary there checked upon our claims, we were informed they were on state land and were not required to file with the BLM office. I assumed there had been a change in the laws, and consequently did not submit a copy of my proof of assessment work. [Emphasis added.]

The record reveals that on November 14, 1978, the State of Alaska filed selection application F-44042 under the provisions of section 6(b) of the

1/ The claims are listed as follows:

<u>BLM Serial Number</u>	<u>Claim Name</u>	<u>Date of Location</u>
F-44987	Maxine	3/30/1961
F-44988	No. 1 Below Maxine	3/30/1961
F-44989	No. 2 Below Maxine	4/1/1961
F-44990	No. 1 On Fox	4/1/1961
F-44992	No. 2 Above On Fox Creek	8/7/1976

Appellant acquired ownership of the claims in 1981. The record indicates that Dorothy A. Cate, appellant's wife, also acquired an interest in the claims. We presume that appellant's appeal is also filed on Ms. Cate's behalf, in which case this decision is final with respect to her interest. However, if appellant was not entitled to appeal on Ms. Cate's behalf (see 43 CFR 1.3), the January 1984 BLM decision was final with respect to her interest. 43 CFR 4.411(c).

2/ The record indicates that James Clayton performed the assessment work and filed the necessary proofs of labor for the claims on behalf of appellant in 1981.

Statehood Act of July 7, 1958, as amended, 72 Stat. 339 (1958), for lands within T. 11 S., R. 5 W., Fairbanks Meridian, Alaska. The State selection encompasses the lands on which appellant's mining claims are located. On August 31, 1979, appellant and the other co-owners of the claims at that time protested the State selection as to the land on which the claims are located. On August 8, 1980, BLM issued a decision tentatively approving 20,331 acres of the State-selected land and excluding 1,960 acres from the tentative approval because of unpatented mining claims located thereon. As to the excluded land, the BLM decision states that "the selection application is suspended until the recordations of these mining claims have been processed." It appears from the record that appellant's mining claims are located on lands excluded from tentative approval.

[1, 2] The Board has consistently held, in conformity with section 314(a) of FLPMA, 43 U.S.C. § 1744(a) (1982), and the applicable Departmental regulations (43 CFR Subpart 3833), that the owner of an unpatented mining claim, located on public land prior to October 21, 1976, must file with the local recording office where the claim is recorded, and with the proper BLM office on or before December 30 in each calendar year following the first filing of either evidence of annual assessment work or a notice of intention to hold the claim, one of those documents. See, e.g., Thurman Oil & Mining Co., 90 IBLA 342, 345-46 (1986); Jayne A. McHargue, 61 IBLA 163 (1982); Kathryn Mackenzie, 58 IBLA 64 (1981). Failure to file the necessary document timely in either office results in a conclusive presumption that the claim has been abandoned and renders the claim void. 43 U.S.C. § 1744(c) (1982); 43 CFR 3833.4(a). In 1982, the deadline for filing appellant's "proof of assessment work" was December 30, 1982.

On February 17, 1984, a copy of appellant's 1982 affidavit of assessment work for the "Maxine and adjoining claims known as Maxine #1-5," owned by appellant, was filed with the Fairbanks District Office, BLM. There is a handwritten notation on the affidavit that it may be found at a certain book and page of the Nenana Recording District, the local recording office. The affidavit is not date stamped by that office. The case file also contains a proof of labor for the claims executed in 1983 which bears date stamps reflecting it was filed with BLM on February 17, 1984, and with the Nenana Recording District on the same date. Thus, there is no evidence that proof of labor for the claims was filed with BLM in either 1982 or 1983.

Indeed, appellant does not actually contend he filed proof of labor with BLM on or before December 30, 1982. Rather, he has submitted the statement of his agent, James W. Clayton, quoted above, asserting Clayton was informed by BLM in 1982 that the claims were on State land and they "were not required to file with the BLM office." Hence, Clayton admits, he "did not submit a copy of my proof of assessment work." Thus, the only real issue before the Board is whether BLM is in some way estopped from holding the claims abandoned and void on the ground the proof of labor was tendered by appellant's agent and BLM improperly refused to accept it or dissuaded him from filing.

By order dated December 4, 1985, the Board directed the Fairbanks District Office, BLM, to "investigate the circumstances of the alleged attempted filing in this case" and to file with the Board a report of that investigation, "including a statement of the BLM Fairbanks Office policy in 1982 regarding section 314 filings presented for mining claims located on lands conveyed to the State, or believed to have been conveyed to the State."

On January 17, 1986, the Acting District Manager, Fairbanks District Office, BLM, submitted a report to the Board, stating that "[i]n 1982, the policy was to accept any document presented to the employees * * * in the Public Room." The Acting District Manager further explained:

- a. If the document was an affidavit of assessment work or notice of intention to hold, the status was not checked or verified but all affidavits were accepted. The affidavits were time stamped and a copy (with the time stamp) was given to the applicant.
- b. If a notice of location was being filed, land status was checked. The applicant was informed if the area was closed to mineral location but notices of location were accepted if the applicant still wanted to file.

This proclaimed 1982 policy of the BLM office where appellant's representative purports to have made his attempted filing indicates that no land status check would have been made by any employees in the public room, where affidavits of assessment work are filed, and that such an affidavit would have been accepted without question. Therefore, it seems unlikely that BLM employees took action or made statements which could reasonably be relied upon by appellant's agent as a basis for not filing the proof of labor. In Thurman Oil & Mining Co., *supra*, the Fairbanks District Office, BLM, responded to a similar allegation in which the appellant contended that the failure to make an annual filing was the result of its predecessor being misled by information provided by a BLM employee. BLM's response in that case was exactly the same as in this case. In rejecting the appellant's argument, we said:

Even assuming the truth of appellant's contentions, which seems unlikely in light of the report provided by BLM, reliance on erroneous information provided by a BLM employee cannot relieve the owner of an unpatented mining claim of an obligation imposed by statute or regulation, create rights not authorized by law, or relieve the claimant of the consequences imposed by the statute for failure to comply with its requirements. Lyman Mining Co., 54 IBLA 165 (1981); John Plutt, Jr., 53 IBLA 313 (1981), and cases cited therein.

90 IBLA at 346.

We are not persuaded by the contention advanced by Judge Arness in his dissenting opinion that "not all offered filings are accepted by BLM." The responses made by BLM in this case and in Thurman, supra, are directly contrary regarding acceptance of proofs of labor for mining claims. Examination of the administrative decisions cited by the dissent do not compel a contrary conclusion. It is true the Board in Ed Bilderback, 89 IBLA 263 (1985), held BLM no longer had jurisdiction over lands selected by Alaska and tentatively approved by BLM where title was subsequently confirmed in the State by ANILCA, 43 U.S.C. § 1635(c) (1982). As these lands were no longer public lands subject to FLPMA, the Board held BLM was not required to accept mining claim recordation filings under section 314 of FLPMA. However, it is worthy of note that in Bilderback the proofs of labor were only rejected after filing and subsequent to adjudication. BLM did not decline to receive the documents. 3/

In David D. Beal, 90 IBLA 87 (1985), the Board reversed a BLM decision declaring certain mining claims null and void ab initio on the ground the land had been segregated from mineral entry. Again, although BLM erroneously declared the claims null and void ab initio and "rejected" the recordation filings under section 314 of FLPMA, the filings were received and adjudicated by appealable decision prior to "rejection."

In Jennie A. Wasey, 92 IBLA 228 (1986), the Board reversed a decision of BLM rejecting in part a notice of location for a mining claim filed for land a part of which was subsequently tentatively approved pursuant to a selection by the State of Alaska. As with the other cases, the recordation documents were received and adjudicated by BLM through issuance of an appealable decision prior to "rejection." See also Eskil Anderson, 95 IBLA 253 (1987).

3/ While Judge Mullen's dissent raises interesting questions concerning possible reliance on erroneous MTP entries, the fact is that in the instant case there were no such erroneous entries nor was there any indication that appellant even looked at the MTP. Insofar as the case abstract of the state selection file is concerned, the Board has expressly held in David Cavanagh, 89 IBLA 285, 92 I.D. 564 (1985), that case files, serial register pages, and other parts of the case record system were not part of the land status records employed by BLM for purposes of the notation rule. Id. at 297-98 nn.6 & 7, 92 I.D. at 571, nn.6 & 7. Moreover, since the copy of the state selection case file abstract found in appellant's case file is dated Apr. 23, 1985, and was generated in response to an inquiry from this Board after the appeal was filed, it is impossible to credit any suggestion that appellant relied on this document. Accordingly, we will not speculate further on what rule should apply if appellant had relied on an erroneous notation on the public land records.

A common element present in all of these cases is the recordation filings, whether notice of location or proof of labor, were received by BLM and adjudicated by an appealable decision prior to rejection of the filings. This is consistent with the practice described in the response of BLM. Contrary to the view asserted in the dissents, this does not establish a practice of refusing to receive assessment work documents which would estop the Department from finding the claims abandoned and void for failure to file with BLM on or before December 30, 1982.

Finally, we note the difficulty inherent in finding a claim of estoppel based on alleged oral advice. Indeed, the case of Brandt v. Hickel, 427 F.2d 53 (9th Cir. 1970), quoted by Judge Mullen in his dissent, concluded that the "estoppel doctrine can properly be applied in this situation where the erroneous advice was in the form of a crucial misstatement in an official decision." 427 F.2d at 57. Thus, the Supreme Court in Heckler v. Community Health Services, 467 U.S. 51, 65, 104 S. Ct. 2218, 2227 (1984), noted:

The appropriateness of respondent's reliance is further undermined because the advice it received from Travelers was oral. It is not merely the possibility of fraud that undermines our confidence in the reliability of official action that is not confirmed or evidenced by a written instrument. Written advice, like a written judicial opinion, requires its author to reflect about the nature of the advice that is given to the citizen, and subject that advice to the possibility of review, criticism and reexamination.

In view of these considerations, this Board has expressly ruled that, as a precondition for invoking estoppel, the erroneous advice upon which reliance is predicated must be "in the form of a crucial misstatement in an official decision." United States v. Morris, 19 IBLA 350, 377, 82 I.D. 146, 159 (1976). See also Marathon Oil Co., 16 IBLA 298, 316, 81 I.D. 447, 455 (1974). Since appellant can point to no such official decision, his claim of estoppel must be rejected.

Finally, it is immaterial that appellant may not have intended to abandon his claims. As the Court stated in United States v. Locke, 471 U.S. 84, 102 (1985): "Thus, Congress has made it unnecessary to ascertain whether the individual in fact intends to abandon the claim, and there is no room to inquire whether substantial compliance is indicative of the claimant's intent -- intent is simply irrelevant if the required filings are not made." Inasmuch as appellant did not make the required filing for the calendar year 1982, appellant's mining claims were properly declared abandoned and void by BLM. 4/ Thorvald W. Hansen, 90 IBLA 159 (1985).

4/ In his January 1986 report, the Acting District Manager states that no evidence of assessment work or notice of intention to hold the claims was filed "for 1985." This by itself renders the claims void.

Accordingly, 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.

Gail M. Frazier
Administrative Judge

We concur:

Wm. Philip Horton
Chief Administrative Judge

James L. Burski
Administrative Judge

C. Randall Grant, Jr.
Administrative Judge

Bruce R. Harris
Administrative Judge

Will A. Irwin
Administrative Judge

John H. Kelly
Administrative Judge

ADMINISTRATIVE JUDGE ARNESS DISSENTING:

For two reasons, I would distinguish Thurman Oil & Gas Mining Co., 90 IBLA 342 (1986), from this case, and hold that Cate is entitled to adjudication of the document which he says was taken in 1982 to the Bureau of Land Management's (BLM) Fairbanks office for recording in compliance with section 314 of the Federal Land Policy and Management Act of 1976 (FLPMA). First, there is in existence a filing document which is susceptible of adjudication; it appears in the form of a 1982 affidavit of work which was filed in 1984. Second, there is a line of cases dealing with this type of situation which gives reason to believe an attempt to timely file the 1982 statement of work was in fact made in this case.

In Ed Bilderback, 89 IBLA 263 (1985), BLM had rejected a miner's assessment affidavits which had been offered for recording following conveyance of the land upon which the claims were located to the State of Alaska. On appeal to this Board, the BLM rejection of the miner's recording documents, where there had been a prior conveyance of the land to Alaska, was approved, even though it appeared the claims were valid when made, having been originally located on Federal land. Id. at 268. In David Beal, 90 IBLA 87 (1985), mining claimants were offered an opportunity to comply with the recording requirement of FLPMA section 314, where it subsequently appeared their filing for record with BLM had been erroneously rejected. In that case, the Anchorage Office had rejected the miner's filing documents because the land upon which the claims were located had previously been included within an invalid Alaska Native selection application. Rejection of the mining claim recordation documents was found not to be proper, as BLM had not conveyed the land upon which the claims were located, nor was there a pending valid Native application. The Board found there was, as a result, no legal basis for treating the land as though it were no longer under Federal jurisdiction and therefore unavailable for mineral entry. Id. at 88, 90.

In Jennie A. Wasey, 92 IBLA 228 (1986), the Anchorage Office again rejected documents offered for filing by a miner in conformity to requirements of FLPMA section 314(b), because a part of the claim was on land which had been conveyed to the State following State selection in 1978. Wasey had made her filing in 1975. Conveyance to the State did not occur until 1983. In Wasey, therefore, unlike Bilderback, there had not been a conveyance prior to Wasey's attempt to file her recording documents, and in fact Wasey's rejected filing was submitted 7 years prior to the conveyance to the State. The rejection of Wasey's records was therefore held to be an error. Finally, although the decision is unreported, in Joseph Gangola, IBLA 85-359, Order dated May 29, 1986, an appeal was remanded to BLM for further consideration where recording documents were rejected by Alaska BLM under circumstances where it was unclear whether or not there had been a prior conveyance of the claimed lands to the State of Alaska.

The principle these cases illustrate, and which was not considered by the decision in Thurman Oil & Gas Mining Co., supra, is that only filings for mining claims on Federal lands are acceptable for filing by BLM. Offered

documentation for other claims is properly rejected. Since this Board has approved the practice of rejecting certain filings it must, as a consequence, recognize and allow for the possibility there may be an erroneous rejection of filing documents where claims which appear to be on non-Federal lands are, in fact, on lands still held in public ownership and control.

In this case, a cursory review of the Anchorage plat and index at the time of the miner's visit to the Anchorage Office may have indicated a conveyance of the lands upon which the mining claim was located to the State, even though the affected claims had been excepted from the conveyance of contiguous land. The State selection is noted on a township plat in the file dated 1982. The notation on the plat does not indicate any exclusion of appellant's claims. The BLM practice of rejecting miner's recording documents for lands conveyed to the State of Alaska, is demonstrated in cases appealed to this Board. See Bilderback, *supra*; Beal, *supra*; Wasey, *supra*. The question is therefore whether Cate's affidavit was in fact rejected. That question is not directly answered by the general statement of practice supplied by BLM in answer to this Board's inquiry concerning the matter.

This is the second point of difference between this case and the Thurman decision: the existence of a document susceptible to adjudication. In Thurman there was no offer of the document which had purportedly been taken to BLM for recording. In this case the document appears in the case file, albeit belatedly filed in 1984. Nonetheless, the existence of the document provides corroboration for the miner's statement that the document was taken to BLM for recording in 1982, since whether the document was acceptable for filing can be determined. That is, a determination can be made whether the affidavit was recorded with the local mining district in 1982. If it was, there is a further indication that Cate's filing was attempted as he describes. Accordingly, I would direct that Cate's 1982 affidavit be offered for adjudication as though timely filed. Since the majority chooses instead to foreclose further consideration of this matter and to find these claims were abandoned as a matter of law in 1982, I am obliged to dissent.

Franklin D. Arness
Administrative Judge

ADMINISTRATIVE JUDGE MULLEN DISSENTING:

I join Judge Arness but find myself compelled to comment further.

When the issue of Bureau of Land Management (BLM) rejection of mining claim recordation documents for claims on lands subsequently conveyed to the State of Alaska arose in Ed Bilderback, 89 IBLA 263 (1985), I struggled with the problem of whether these documents should be rejected. Assuming for purpose of this dissent the claimant has made a discovery and done all else necessary to perfect the claim, a mining claimant has valid existing rights under Federal laws. Those laws are administered by BLM. The laws pertaining to mining claim recordation (MCR), 43 U.S.C. § 1744 (1982), provide that, if a claimant does not file MCR documents in a timely manner, those rights are lost.

My initial concern in Bilderback was the claimant's ability to defend against a claim by the State that the mining claim had been rendered abandoned and void because the owner's MCR documents had not been filed pursuant to 43 U.S.C. § 1744 (1982). This concern was overcome after examination of the legislative history of the Federal Land Policy and Management Act of 1976 (FLPMA). The intent of Congress was to allow BLM a means by which it could identify active mining claims to aid it in the administration of Federal lands, and purge its records of abandoned claims. In Bilderback the administration of the lands had been passed to the State, and the underlying purpose for MCR filings no longer existed. Therefore, I concluded that if BLM chose to except such claims from MCR requirements, a claimant such as Bilderback would no longer be required to file MCR documents to avoid having his claim declared abandoned and void.

In Elizabeth S. Hjellen, 93 IBLA 203 (1986), the Board quoted Bilderback, and held:

The Board reasoned in Bilderback that "[s]ince the land sought to be claimed by appellants is located upon land which was conveyed to the State of Alaska * * * the land is no longer part of the public lands of the United States." 89 IBLA at 265. For this reason, "the Department does not retain any vestige of jurisdiction over claims of valid existing rights [to the conveyed land], and will not afford a forum in which such claims may be decided." Id. at 267.

Elizabeth S. Hjellen, supra at 206.

Since a MCR document need not be filed after land has been conveyed to the State of Alaska, the "failure" to do so would have no adverse effect on the validity of the claim. Said another way, it is not a question of whether BLM has the right to reject filings, but a question of, whether, under present BLM policy, a claimant holding claims on land conveyed to the State is obligated to make those filings. BLM has determined that there is no obligation. Therefore, the act of rejection of MCR documents is akin to the ministerial

act of returning documents which have been improperly tendered. After considering BLM's stated policy, I joined with the Board in Bilderback when it found it to be within BLM's scope of authority to reject MCR documents filed after the lands have been conveyed to the State of Alaska.

My decision to affirm BLM's rejection of MCR documents was not made without reservation, however. While recognizing that such practice was within BLM's authority, I questioned the advisability of the course of action taken by BLM. See my concurring opinion in Bilderback, id. at 269. As will be seen, the concern, which I noted in that concurrence, is founded.

At the time the Board was considering Bilderback, we were also deliberating on a case entitled David Cavanagh, 89 IBLA 285, 92 I.D. 564 (1985). In that case this Board held that the Department could rely upon an evidentiary device known as the "notation rule" to determine that there had been a segregation of public land from subsequent appropriation, by a notation upon the Master Title Plat (MTP) that there had been a state selection of the land. The effect of this finding was to render null and void ab initio those mining claims located upon the land noted on the MTP to be under selection by the State, even though the selection notation was erroneous. The basis of my concern involves a logical and reasonable extension of Cavanagh: what happens when there is a notation showing a conveyance to the State pursuant to ANILCA? This notation may well be correct as far as it goes. However, in a number of cases mining claims are located within the selection and excluded from the State selection by the tentative approval (TA) document. This fact usually does not appear on the MTP. Applying the logic of the Cavanagh decision, it is logical that a claimant should also be entitled to rely upon the presumption that the notation was correct, whether it was in fact correct or not. See Cavanagh at 296.

The majority focuses upon a document filed by the Acting District Manager, Fairbanks District Office, BLM, and quotes from that document at length. By doing so they have failed to address what I believe to be a compelling issue presented by this case. In light of the policy first discussed in Bilderback that a claimant need not file MCR documents for claims on land subsequently conveyed to a state, a serious issue is whether the notation would lead an ordinary citizen of the State of Alaska to believe that lands embracing his claims had been conveyed to the State. This ordinary citizen may have been the claimant or even a secretary, who advised appellant as to the meaning of MTP notations but who did not have authority to reject MCR documents.

While an individual cannot rely upon an error on the part of a Government employee to create a right he would not otherwise have, a member of the public has the right to rely upon a written Government pronouncement regarding the status of the public lands. When that pronouncement is in error, that error cannot be later used to defeat a right which had vested in the relying party prior to the erroneous pronouncement. Reeves v. Andrus, 465 F. Supp. 1065 (D. Alaska 1980). As stated by Judge Chambers:

To say to these appellants, "The joke is on you. You shouldn't have trusted us," is hardly worthy of our great government.

We would have a much different case if the booby trap unwittingly set for Mrs. Brandt and Mrs. Shell had somehow hurt the government. Bad advice cannot ordinarily justify giving away to individuals valuable government assets. This is no such case.

Brandt v. Hickel, 427 F.2d 53, 57 (9th Cir. 1970).

What is the error in the Government's pronouncement, and what are the consequences of that error? Cavanagh identifies the error as being the failure to properly note the exclusion of mining claims when noting the conveyance to the State on the MTP and case file abstract for the State selection. An ordinary citizen looking at the MTP or abstract would conclude that the lands had passed to the State. No more and no less. Applying the rationale in Cavanagh, the fact that the notation indicating the land had been conveyed to the State of Alaska creates a "prima facie" case that the lands had been conveyed to the State.

The majority concludes the Government should not be bound by unauthorized acts of its representative, and cites cases in support of that doctrine. However, the acts of entering notations on a MTP and abstract are authorized and are clearly within the scope of BLM's authority. The majority does not question BLM's authority to enter notations or its authority to adopt policy that MCR documents need not be filed if the land has been conveyed to the State. In Cavanagh the Board held that an ordinary citizen has the right to rely upon the notations shown on the MTP, even if there was an error. I accept that finding to be sound. However, the "notation rule" also leads to the conclusion that reliance upon the MTP showing that a mining claim was on land conveyed to the State prohibits BLM's declaring the claims void, just as it would prohibit finding a claim valid. Cavanagh clearly holds that an ordinary citizen is entitled to rely upon the MTP. A claimant should not be penalized for having done so. To hold otherwise would be to adopt an obviously inconsistent position to the detriment of a mining claimant.

As noted in Brandt v. Hickel, supra,

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. * * * The Secretary was understandably concerned that the estoppel doctrine can have a deleterious effect on administrative regularity. However, administrative regularity must sometimes yield to basic notions of fairness.

Brandt, supra at 56-57. In United States v. Lazy FC Ranch, 481 F.2d 985 (9th Cir. 1973), the Ninth Circuit Court stated:

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. Gestuvo v. District Dir. of I.N.S., 337 F. Supp. 1093 (C.D. Cal. 1971). This proposition is true even if the government is acting in a capacity that has traditionally been described as sovereign (as distinguished from proprietary) although we may be more reluctant to estop the government when it is acting in this capacity. See Georgia-Pacific, [421 F.2d 92 (9th Cir. 1970)]. [Footnote omitted.]

United States v. Lazy FC Ranch, supra at 989.

The majority questions appellant's allegation that he had been advised by a secretary working for BLM that filings were not necessary. However, they do not claim the MTP properly noted the exclusion of appellant's claims from the State selection application which led to the conveyance to Alaska or that the abstract of the State selection application case file indicated the exclusion. It is clear that they did not. There is no question that a written utterance was made on the MTP showing the land embracing Cate's claims had been selected by the State. The selected land had been conveyed out of Federal ownership, and the TA of the land was shown on the State selection case file abstract with no indication that the land subject to appellant's mining claims had been excluded.

I am concerned that an injustice will ensue. Property rights will be lost despite the fact that the public interest would not be unduly damaged by recognition of "estoppel" considerations. The public would be damaged to no greater extent by a recognition of the claimant's reliance upon BLM utterances than it would have been had the MCR documents been filed. See United States v. Wharton, 514 F.2d 406 (9th Cir. 1975). Further inquiry should be made as to the nature and extent of the reliance on land status records before finding the claims abandoned and void.

R. W. Mullen
Administrative Judge