

IBLA 85-758
87-295

Decided October 20, 1987

Appeals from decisions of the Montana State Office, Bureau of Land Management, declaring royalty reservations invalid. BLM-A-023570, et al.; NDBLMA 037199.

Affirmed.

1. Oil and Gas Leases: Royalties -- Public Lands: Generally -- Public Lands: Jurisdiction Over

Under North Dakota law, when a county conveys lands acquired through tax proceedings, it must convey all its interest in such lands; an attempted reservation of any part of its interest is void. Where such lands were subsequently acquired by the United States through condemnation proceedings, BLM properly declared the counties' attempted reservation of royalty and mineral interests invalid.

2. Board of Land Appeals -- Estoppel

The Board of Land Appeals has well established rules governing consideration of estoppel issues. They are the elements of estoppel described in United States v. Georgia Pacific Co.; the rule that estoppel is an extraordinary remedy, especially as it relates to public lands; and the rule that estoppel against the Government must be based upon affirmative misconduct.

3. Administrative Authority: Estoppel -- Federal Employees and Officers: Authority to Bind Government -- Public Lands: Administration -- Secretary of the Interior

The Secretary of the Interior is not estopped by the principles of res judicata or finality of administrative action from correcting, reversing, or overruling an erroneous decision by subordinates or predecessors in interest.

APPEARANCES: Dennis Edward Johnson, Esq., Watford City, North Dakota, for McKenzie County; Jay V. Brovold, Esq., Medora, North Dakota, for Billings County; John D. Carver, Esq., Englewood, Colorado, for Tenneco Oil Company; Richard K. Aldrich, Esq., Field Solicitor, U.S. Department of the Interior, Billings, Montana, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE KELLY

McKenzie and Billings Counties, North Dakota, and Tenneco Oil Company (Tenneco) appeal from a June 7, 1985, decision of the Montana State Office, Bureau of Land Management (BLM), declaring invalid royalty reservations claimed by McKenzie, Billings, and Golden Valley Counties, North Dakota, in lands acquired by those counties through tax proceedings and subsequently acquired by the United States as the result of condemnation proceedings. These appeals were docketed by the Board as IBLA 85-758.

In addition, McKenzie County has appealed from a January 30, 1987, BLM decision declaring invalid a mineral reservation by McKenzie County for the lands included in oil and gas lease NDBLMA 037199, which lands were obtained by McKenzie County through tax proceedings and later acquired by the United States as the result of condemnation proceedings. McKenzie County's appeal from this January 30, 1987, decision was docketed by the Board as IBLA 87-295. Because both appeals involve the same legal questions, we have consolidated them for decision.

BLM's June 7, 1985, decision covers 119 tracts in McKenzie County, 10 tracts in Billings County, and 2 tracts in Golden Valley County. It declared invalid a 6-1/4-percent royalty reservation by the counties, and required such royalties to be paid to the United States effective July 1, 1985. An enclosure to the decision gives the legal description and acquisition number for each tract, and lists the serial numbers of leases, unit agreement numbers, and the names of lessees and unit operators. Exhibit "A" to BLM's decision is a list of numerous oil, exploration, and energy companies having interests in the lands at issue who were served with BLM's decision. McKenzie and Billings Counties have each filed a statement of reasons (SOR), McKenzie County has also filed a supporting brief, and BLM has filed a response to McKenzie County's SOR. Tenneco, which holds various lease interests in McKenzie and Billings Counties, has also filed a SOR. No appeal has been filed by Golden Valley County, nor by any other energy company or business served with BLM's decision.

In its January 30, 1987, decision, BLM declared invalid a mineral reservation in lands included in the Texas Company's (Texaco) oil and gas lease NDBLMA 037199, which covers lands situated in T. 153 N., Rs. 95 and 96 W., in McKenzie County. McKenzie County's reservation included the right to prospect for and exploit oil and gas until February 15, 1962, subject to an extension. This right was limited to an area of 25 acres around each well which is producing, is being drilled, or is being developed at the time of termination. BLM's decision states that there were five wells producing at the time the oil and gas "vested with United States", *i.e.*, February 15, 1962. BLM's decision calls on the Minerals Management Service to determine whether the correct amounts of royalties were being received by the United States.

The lands at issue were acquired by the counties through tax proceedings in the 1920's and 1930's. In 1937, the United States Department of Agriculture brought condemnation proceedings to acquire the lands for the Little Missouri Land Adjustment Project in order to, inter alia, control soil erosion, conserve water resources, and facilitate grazing research. All condemnation actions were conducted on the same format. The United States filed "Declarations of Taking" in the U.S. District Court for the District of North Dakota. These declarations recited the statutory authorities under which the condemnations were carried out, described the tracts of land involved, and stated that "title and estate in full fee simple" was being taken "subject, however, to the rights of [Billings, McKenzie, or Golden Valley County], State of North Dakota, to 6-1/4 % perpetual royalty in minerals which exist or may be developed on said lands and also subject to and excepting all public roads, public utility easements and rights of way." During the period from 1938 through 1941, the court entered judgment in favor of the United States. Each judgment recited the 6-1/4-percent royalty reserved to the counties. The counties delivered tax deeds prescribed by North Dakota law to the United States, transferring their title in the subject lands. These deeds of conveyance to the United States did not recite the royalty reservations.

BLM's June 7, 1985, decision provides the following rationale for declaring the royalty reservations in McKenzie, Billings, and Golden Valley Counties void: "The North Dakota Supreme Court has held that a North Dakota county could not reserve a royalty or other interest in lands which were acquired through tax proceedings and that an attempt to reserve such interests is void. De Shaw v. McKenzie County, 114 N.W. 2nd [263] (N.D. 1962)."

BLM's January 30, 1987, decision is based upon "an opinion from our Field Solicitor stating that the mineral reservation by McKenzie County for the lands included in oil and gas lease NDBLMA 037199 was an invalid reservation for the reasons stated in his April 16, 1984, opinion." In that April 16, 1984, memorandum, the Field Solicitor states that "the North Dakota Supreme Court has repeatedly held that counties cannot reserve minerals in lands which it acquired for nonpayment of taxes." The Field Solicitor based this conclusion upon Kopplin v. Burleigh County, 47 N.W.2d 135 (N.D. 1951), which also served as precedent for the De Shaw ruling.

McKenzie and Billings Counties argue that De Shaw is inapplicable to the royalty and mineral reservations involved in these appeals. McKenzie County asserts that "[t]he De Shaw opinion expressly does not reach or decide the issue for which it is being relied upon by the BLM" (McKenzie County SOR at 8), and relies upon that portion of the De Shaw opinion in which the North Dakota Supreme Court states that "[b]ecause the county had ceased to be the owner of any part of the tax title by the giving of [the tax] deed, we need not determine the effect of the judgment in subsequent condemnation proceedings * * *. Such subsequent proceedings would be immaterial so far as this case is concerned." 114 N.W.2d at 266. According to McKenzie County, such subsequent proceedings are in fact material to the instant appeals, because their royalty interest "vested in the County by the condemnation proceedings, [and] was in no way a reservation of a tax title interest" (McKenzie County SOR at 11). The reasoning of McKenzie County is set forth below:

[T]he County's royalty was a new interest, separate, distinct, unrelated to the former tax title, founded wholly upon the title litigation, and the estate condemned by the United States. The County's royalty is not a tax title but a litigated title. Its origination is in the federal condemnation proceedings which brought the royalty into existence. The County's royalty is unconnected to the tax title.

(McKenzie County SOR at 11). Thus McKenzie County concludes that "the De Shaw court perceived that a new title was established by the condemnation proceedings, rather than, as the BLM would have it, that the County cannot claim a royalty in tax title lands condemned by the United States" (McKenzie County SOR at 15-16). McKenzie County asserts that the purpose of the statute underlying the De Shaw decision, precluding a county from reserving any part of its tax title, "was directed at voluntary sales where the purchaser submitted to the taxing authority of the County, not a condemnation by the United States which pays no taxes" (McKenzie County SOR at 12).

Tenneco supports the argument advanced by McKenzie County that the North Dakota Supreme Court expressly declined to address the effect of "subsequent condemnation proceedings." Tenneco argues that to affirm BLM's decision is "[t]o allow the [BLM] to unilaterally amend the terms of leases to provide for the payment of the full royalty to the United States on the basis of a North Dakota Supreme Court decision which is inapplicable to the facts * * *" (Tenneco SOR at 2).

In its response, BLM states that De Shaw and Kopplin "stand for the proposition that a North Dakota county could not 'reserve' any mineral interests, or any other interest, acquired by tax title proceedings in subsequent sales" (Response at 2). Therefore, argues BLM, "[t]he deeds to the United States extinguished the County's tax title in its entirety" (Response at 3). BLM asserts that the condemnation documents reflect the erroneous assumption held by the parties at the time that McKenzie and Billings Counties could validly retain mineral interests in lands obtained through tax proceedings. BLM claims that the 6-1/4-percent royalty as referred to in the condemnation judgments is clearly a "reservation" and void under De Shaw and Kopplin, as opposed to the creation of a new royalty interest in the counties.

[1] These appeals turn upon whether BLM was correct in its conclusion that the royalty reservations claimed by McKenzie and Billings Counties in IBLA 85-758, and the mineral reservation claimed by McKenzie County in IBLA 85-259, are void under De Shaw and Kopplin. For the reasons discussed below, we affirm BLM's application of those cases.

In De Shaw, the plaintiff became owner of certain land by patent from the United States issued on November 1, 1921. He paid no taxes on the land, and on June 1, 1929, McKenzie County acquired the land through tax deed proceedings. On June 11, 1937, McKenzie County gave the United States an option to purchase the land, attempting to reserve to itself certain mineral rights. The United States exercised the option and agreed to purchase the land subject to the mineral reservations. The land formerly owned by the plaintiff

was included in land against which the United States filed condemnation proceedings in 1938. By judgment entered in these proceedings, title to the land was vested in the United States subject to McKenzie County's exclusive right "for a period of twenty-five (25) years * * to prospect for and exploit gas and oil in, on and under said tracts, with the right to extensions of five (5) year periods in perpetuity." 114 N.W.2d at 264-65. However, as in the instant appeals, the tax deed which McKenzie County delivered to the United States in De Shaw contained no reservations of any kind. McKenzie County subsequently issued mineral leases for the land. At the time the court rendered its opinion, four producing wells were located on the land formerly owned by plaintiff De Shaw. The litigation arose when De Shaw, on January 25, 1960, attempted to repurchase the land from the county, agreeing to accept whatever title then remained in the county, in full satisfaction of his right to redeem and repurchase.

The North Dakota Supreme Court ruled that McKenzie County's attempted reservation was void, that McKenzie County's deed to the United States conveyed its entire interest in the lands, and therefore that McKenzie County owned no interest for plaintiff to repurchase. The court's reasoning, which we conclude is dispositive of the instant appeals, is set forth below:

[1, 2] When the defendant McKenzie County, in acquired the tax deed to the plaintiff's property through tax proceedings, the validity of which proceedings are not questioned by the plaintiff, such property became the absolute property of McKenzie County in the same manner as if it had been purchased at tax sale by an individual purchaser. Sec. 2202, 1925 Supp., N.D. Comp. Laws. When the county, on June 11, 1937, gave to the United States of America an option to purchase this land, with certain reservations, its duty under the law was to offer to sell all of its interests therein, without reservation. Chapter 288 of the 1931 Session Laws of the State of North Dakota, in force at the time of this sale, provided that, upon full payment,

* * * the county shall execute and deliver to the purchaser a deed conveying all right, title and interest, in and to such property.

There is no provision in the law for the county to convey anything less than all of its right, title, and interest in and to such tax-title property. There is no authority for the county to reserve any part of its tax title. The statute having declared what title, estate, and interest of the county shall be conveyed to the purchaser of the land forfeited to it for nonpayment of taxes, a deed conveying a lesser title, estate, or interest is void as to any estate or interest attempted to be reserved contrary to the provisions of law. Kopplin v. Burleigh County, 77 N.D. 942, 47 N.W.2d 137.

As was pointed out by this court in the Kopplin case, the law does not provide that the county convey a valid title in fee

simple to the purchaser, but it does provide that the county shall convey all the right, title, and interest which the county may have in and to such tax-title property.

[3] Where the statute specifically provides what the county shall convey, the substance of the deed may not be altered or varied by county officers executing it. Their statutory authority determines what the deed conveys. Thus the substance of the deed may not be changed from what the statute provides shall be conveyed. In this instance, the statute orders the county, in conveying land forfeited to it for nonpayment of taxes, to convey to the purchaser all right, title, and interest which the county has in such lands. The attempted reservation by McKenzie County in the deed of June 11, 1937, to the United States of America was not a compliance with the law, and the attempted reservation by the county was void.

[4] Since the effect of the giving of the deed by the county to the Federal Government in 1937 was to convey all the right, title, and interest which the county had in and to the lands in question, the county, by giving such deed, parted with all of its title. There remained no part of the tax title in the county for the original owner to repurchase. Because the county had ceased to be the owner of any part of the tax title by the giving of such deed, we need not determine the effect of the judgment in subsequent condemnation proceedings, which judgment gives to the county the right to prospect for and to exploit gas and oil, nor need we determine the effect of the giving of the tax deed of September 5, 1939, by the county to the United States, which deed contained no reservation of any kind or nature, Such subsequent proceedings would be immaterial so far as this case is concerned.

No portion of the original tax title remaining in the county at the time the plaintiff made his demand and application, as former owner, to repurchase, the application of the plaintiff to repurchase was properly rejected by the county. [Emphasis added.]

114 N.W.2d at 265-66.

The De Shaw court relied upon Kopplin in ruling that a deed conveying less than all of the county's interest in tax-title property "is void as to any estate or interest attempted to be reserved." Id. at 266. As previously noted, BLM's January 30, 1987, decision, declaring invalid McKenzie County's attempted mineral reservation for the lands included in oil and gas lease NDBLMA 037199, incorporated by reference an April 16, 1984, opinion by the Field Solicitor. In that opinion, the Field Solicitor quoted portions of Kopplin in concluding that "the North Dakota Supreme Court has repeatedly held that counties cannot reserve minerals in lands which it acquired for nonpayment of taxes."

Kopplin involved lands acquired by Burleigh County, North Carolina, through tax proceedings, and subsequently conveyed to the plaintiffs through private sale. Plaintiffs filed suit to determine adverse claims to several tracts of land situated in Burleigh County. Burleigh County, the only defendant, had reserved in the tax deed 50 percent of all oil, natural gas, or minerals on or underlying the lands involved. The Supreme Court quoted the deed provided at 1943 N.D. Sess. Laws § 57-2816 of North Dakota which includes the following provision: "Upon the payment of the purchase price in cash, or the payment in full of all installments, with interest to the date of payment, the county shall execute and deliver to the purchaser a deed conveying to him all right, title, and interest of the county in and to such property." The court ruled that the county's attempted reservation by deed was void:

The foregoing form of deed prescribed by statute is the only form of deed the county is authorized to use in conveying lands acquired by it for non-payment of taxes. The form does not contain any reservation such as the one inserted in the deed involved in this action. The statute having declared what title, estate and interest of the county should be conveyed to the purchaser of lands forfeited to it for non-payment of taxes, a deed conveying a lesser title, estate or interest is void as to any estate or interest attempted to be retained contrary to the provisions of the statute.

56 N.W.2d at 139-40. See also State v. California Co., 56 N.W.2d 762 (N.D. 1953); Kershaw v. Burleigh County, 47 N.W.2d 132 (N.D. 1951).

We reject the argument that De Shaw and Kopplin are inapplicable to the instant appeals. The royalty reservation in IBLA 85-758 and the mineral reservation in IBLA 87-295 are both contrary to the 1931 and 1943 North Dakota statutes, as interpreted by the Supreme Court of North Dakota in those cases. The De Shaw court saw no need to address the effect of the judgment in subsequent condemnation proceedings because McKenzie County had already conveyed all right, title, and interest in the lands to the United States by tax deed in 1937.

We agree with McKenzie County that "[t]he exercise of eminent domain establishes a new title and extinguishes all previous rights" (McKenzie County SOR at 15). However, as pointed out by BLM, the condemnation judgments established the "new title" in the United States, and extinguished all of McKenzie County's rights. The effect of McKenzie County's deeds was to convey all its interest in the lands to the United States.

Thus, McKenzie County's argument that the 6-1/4-percent royalty interest is a new interest created by the condemnation proceedings ignores the facts in the record as well as North Dakota law. All lands in issue were acquired in tax proceedings. ^{1/} All lands in issue were conveyed by McKenzie and

^{1/} In their statements of reasons, both McKenzie and Billings Counties argue that some of the lands involved may not have been acquired by tax deed and that some of the mineral interests in question were granted to

Billings Counties to the United States by means of tax deeds as prescribed by North Dakota law. Applicable provisions of State law, as construed by the highest court of that State, required that upon conveyance of lands taken for nonpayment of taxes, McKenzie and Billings Counties must convey all right, title, and interest therein. The fact that the lands involved in these appeals were acquired by the United States as a result of condemnation proceedings does not validate the attempted mineral and royalty reservations.

We rule that the mineral and royalty reservations involved herein are void as a matter of North Dakota law. See United States v. McKenzie County, 187 F. Supp. 470 (D.N.D. 1960), aff'd sub nom. Murray v. United States, 291 F.2d 161 (8th Cir. 1961).

[2, 3] McKenzie County further argues that principles of estoppel and res judicata prevent the United States from renouncing the county's right to 6-1/4-percent royalty from the subject lands. This Board has adopted the elements of estoppel described by the Ninth Circuit Court of Appeals in United States v. Georgia Pacific Co., 421 F.2d 92 (9th Cir. 1970):

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 facts; and (4) he must rely on the former's conduct to his injury.

Id. at 96 (quoting Hampton v. Paramount Pictures Corp., 279 F.2d 100, 104 (9th Cir. 1960)). See also State of Alaska, 46 IBLA 12, 21 (1980); Henry E. Reeves, 31 IBLA 242, 267 (1977). We have also adopted the rule of numerous courts that estoppel is an extraordinary remedy, especially as it relates to the public lands. See Harold E. Woods, 61 IBLA 359, 361 (1982); State of Alaska, supra. Estoppel against the Government in matters concerning the public lands must be based upon affirmative misconduct, such as misrepresentation or concealment of material facts. United States v. Ruby Co., 588 F.2d 697, 703 (9th Cir. 1978); Ptarmigan Co., 91 IBLA 113, 117 (1986).

In United States v. McKenzie County, supra, the United States District Court for the Northern District of North Dakota (District Court), responded to arguments that BLM was estopped by a previous decision from challenging McKenzie County's right to minerals based upon a reservation in a tax deed. Those lands were acquired by McKenzie County in tax proceedings in 1940, and McKenzie County subsequently conveyed the land to Ivan Murray, reserving unto itself certain mineral interests. Murray conveyed the land to the United States, the deed reciting the mineral reservation in favor of McKenzie County.

fn. 1 (continued)

them by the Federal Government. However, neither appellant has identified such lands or interests. Nor have they submitted any other evidence in support of their arguments. In the absence of such evidence, appellants' arguments must be rejected.

Thereafter, Murray conveyed a fractional mineral interest to Mullaney. In 1956, BLM issued a decision, relying upon Kopplin, declaring that McKenzie County held no mineral reservation. Murray and Mullaney defended the quiet title action on the basis that the 1956 decision estopped the United States from questioning their title.

The District Court rejected the estoppel and res judicata arguments in United States v. McKenzie County, *supra*, stating as follows:

Generally, an administrative determination does not constitute an estoppel against the United States. * * * The government of the United States cannot be estopped by the unauthorized acts of its officers and agents acting contrary to law. * * * Plainly, the decision of the Department of the Interior referred to above was rendered for the purpose of administratively determining the validity of the * * * leases. As an incident to the determination, the Department concluded that if the leases were to continue in effect it was essential for proper administration of the lands involved to determine the extent of the mineral interests which these leases covered. Such determination has no effect beyond the administrative purpose for which it was rendered, for the reason that under the law it was then administering, the Department's authority is limited to the leasing functions therein prescribed.

187 F. Supp. at 474.

Such reasoning applies with equal force to the instant appeals. By its decisions dated June 7, 1985, and January 30, 1987, BLM is attempting to correct previous erroneous actions by predecessors in interest, based upon De Shaw and other case precedent. As we held in Pathfinder Mines Corp., 70 IBLA 264, 278, 90 I.D. 10, 18-19 (1983), the Secretary is not estopped by the principles of res judicata or finality of administrative action from correcting, reversing, or overruling an erroneous decision by subordinates or predecessors in interest. The United States does not waive its right to receive royalties lawfully due by acquiescing, for a period of years, to erroneous payments. See Sinclair Oil & Gas Co., A-30709, 75 I.D. 155, *aff'd sub nom. Atlantic Richfield Co. v. Hickel*, 432 F.2d 587 (10th Cir. 1970).

McKenzie and Billings Counties have advanced various constitutional arguments in summary form. We reject the claim that BLM's decisions amount to violations of the Fifth Amendment, since as pointed out by BLM, there could be "no taking because the royalty reservation never existed" (Response at 5). Further, a prior hearing is not required in every case in which a party is deprived of property, if the party is given notice and an opportunity to be heard before the deprivation is final. Joseph A. Barnes, 78 IBLA 46, 60, 90 I.D. 550, 558 (1983).

To the extent appellants have raised arguments which we have not specifically addressed herein, they have been considered and rejected.

Accordingly, 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.

John H. Kelly
Administrative Judge

We concur:

Gail M. Frazier
Administrative Judge

Wm. Philip Horton
Chief Administrative Judge

