DOCUMENT RESUME

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[Claim for Damages Resulting from Breach of Oral Agreement]. B-188607. July 19, 1977. 9 pp.

Decision re: Joseph R. Able; by Paul G. Dembling (for Elmer B. Staats, Comptroller General).

Issue Area: Land Use Planning and Control (2300).
Contact: Office of the General Counsel: General Government Matters.
Budget Function: General Government: Other General Government (806).
Organization Concerned: Farmers Home Administration; Forest Service.
Authority: 42 U.S.C. 4651. B-181432 (1976). B-185199 (1977). B-153707 (1966). B-184130 (1975). B-182730 (1975). B-181432 (1976). B-164676 (1969). B-178280 (1973). 43 Comp. Gen. 217. 37 Comp. Gen. 485. 49 Comp. Gen. 44. 49 Comp. Gen. 47. 53 Comp. Gen. 86. 54 Comp. Gen. 271. 46 Comp. Gen. 348. 44 Comp. Gen. 337. 55 Comp. Gen. 911. 53 Comp. Gen. 502. Forest Service Manual, sec. 5461.31. 30 Am. Jur. 2d Evidence 1016. Crow v. Crow, 66 Wash. 2d 108, 401 P. 2d 328 (1965). Apple v. McCullough, 239 Ky. 74. 38 S. W. 2d 955 (1931).

George D. Breitmeier, Authorized Certifying Officer, Forest Service, requested a decision on a citizen's claim for $10,000 damages resulting from alleged breach of oral agreement relating to claimant's granting right-of-way easement over private property. Claimant was entitled to receive $85, the difference between agency appraisal and $1 consideration for right-of-way. Additional orally promised compensation (gravel) was unauthorized, and Government is estopped from honoring it. There is no statutory authority to allow attorney's fees. Whether additional loss occurred and whether from breach of promise must be determined by agency. (DJM)

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DECISION

THE COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-188607 DATE: July 19, 1977

MATTER OF: Forest Service--claim for damages resulting from breach of oral agreement

DIGEST:

1. Claimant is entitled to receive $85, representing difference between $86 appraised value of right-of-way granted to Forest Service and $1 consideration recited in easement deed. Because claimant signed deed in reliance on oral agreement that he would receive additional consideration in form of crushed rock for his store parking lot, and had no knowledge, constructive or actual, that agreement was unauthorized, Government is estopped from denying existence of agreement.

2. Claim for attorney's fees ($1000) is disallowed in absence of express statutory authorization. 37 Comp. Gen. 485 (1958) and 49 id. 44 (1969).

3. No opinion is expressed concerning balance of claim for business and other general unspecified damages since Forest Service has initial responsibility for determining whether such loss did occur and, if so, whether loss resulted from breach of promise by Forest Service.

This decision is in response to a request from Mr. George D. Breitmeier, Authorized Certifying Officer, Forest Service, United States Department of Agriculture (USDA), for a ruling by our Office as to the propriety of payment of any or all of a $10,000 claim against the United States Forest Service that was filed on behalf of Mr. Joseph R. Able of La Grande, Oregon, by the attorney representing him, to recover damages suffered as a result of an alleged breach of an oral agreement between Mr. Able and a Forest Service official. On the basis of the information contained in the certifying officer's submission and the supporting documentation, the facts concerning this matter are as follows:

On August 27, 1974, Mr. and Mrs. Able granted an easement to the Forest Service for a road right-of-way across a portion of their property in Union County, Oregon near the Wallowa-Whitman National Forest. This right-of-way was needed, in addition to an existing road right-of-way across the Ables' property, for the purpose

of widening and straightening a Forest Service Road that was planned for reconstruction by the purchaser of a proposed Dry Timber Sale. The easement included 1.15 acres which had a fair market value of $86, as determined by a Forest Service appraisal. The deed granting the easement provided for nominal consideration of $1 to be paid to the Ables. Prior to signing the deed, however, the Ables were advised of the Forest Service's estimate of the property's fair market value and were apparently offered that amount as just compensation for the property. This is in accordance with the procedure set forth in 42 U.S.C. § 4651, establishing a uniform policy for the acquisition of real property by the Federal Government. That statute requires that all Federal agencies that acquire real property must offer just compensation (provided that the amount offered may not be less than the agency's approved appraisal of the property's fair market value). However, the statute does not preclude the owner from accepting less than that amount if he knowingly chooses to do so.

Prior to granting the easement, Mr. Able had made a verbal agreement with a Forest Service official, the then District Ranger of the La Grande Ranger District, to the effect that the Forest Service would have some quantity of rock placed on the Ables' private property in exchange for the easement deed. That an agreement of this nature was made is not disputed; however, there are differences of opinion about the terms of the agreement.

Mr. Able contends that his understanding of the agreement was that surplus crushed rock would be placed on the parking lot in front of his store, the Starkey Trading Post, and at least a portion of his road leading to his private campground. The record does not indicate that the quality, quantity, and dollar value of the rock that Mr. Able expected to receive were specifically stated by him at the time the agreement was made. The fact that Mr. Able did expect to receive some rock was documented when the Farmers Home Administration (FmHA) approved an application from the Ables, subordinating FmHA's lien to the easement deed. The approved application stated that the "extra gravel will be used for their parking lot and roads leading into the campgrounds, etc." However, this information was provided to FmHA by the Ables at the time they signed the application, on November 18, 1974, several months after the easement was granted.

The former District Ranger has stated that his understanding of the agreement was that the Forest Service would have about four loads of reject crushed rock placed on the Ables' parking lot. Reject rock is defined as rock not meeting road construction specifications. The Ranger District employee in charge of right-of-way acquisitions also understood that the agreement was for the Forest Service to have three

or four loads of reject rock placed on the Ables' parking lot. The intended source of rock for surfacing the reconstructed road, as well as that to be provided to the Ables, was a rocky point on the right-of-way property. The rocky point was removed during the reconstruction process, but the rock was not crushed because the quantity was not sufficient to support an economical crushing operation. Rock for surfacing the road was obtained from another source.

On September 14, 1976, the new La Grande District Ranger formally notified the Ables that the Forest Service could not honor the agreement to place rock on their private property because the Forest Service had no statutory authority to enter into this type of exchange agreement and, more significantly, was specifically prohibited by instructions in section 5461.31 of the Forest Service Manual from "trading of one thing for another; that is, a right-of-way for improvements."

Relying on the general rule that the Government is not responsible for the unauthorized acts of its agents, the certifying officer who submitted the claim to us takes the initial position that since the Government official who agreed to the exchange lacked authority to do so, in that such exchange agreements are specifically prohibited by the Forest Service Manual, the entire claim should be denied. However, in his submission the certifying officer specifically directs our attention to an opinion by the USDA Regional Attorney to the effect that the claim should be settled on the theory of equitable estoppel. Although the Regional Attorney's opinion concludes that under an estoppel theory, the Ables would be entitled to $1,000 based on the Forest Service's computation of the cost of rock placement in the parking lot and turnout, and recommends that it be submitted to our Office for approval in that amount, the certifying officer suggests that $86 would be the appropriate settlement amount, should we agree that the estoppel theory is correct. The basis for the certifying officer's conclusion in this regard is set forth as follows in his submission:

> "1. The file does not support Mr. Able's contention that he expected to receive rock of a quantity and quality that would equal $1,000.00 in value. The FmHA form dated 11/18/74 indicates that he expected to receive the 'extra gravel' obtained from removal of the rocky point. The term 'extra gravel' implies a quantity of rock not needed and/or not suitable for surfacing the road, and seems to coincide with the District Ranger's contention that the Ables would receive about four loads of reject rock. In a normal crushing operation several cubic yards of reject crushed rock are produced before the crusher begins to meet road construction specifications for size. Under the agreement, it was this relatively small quantity of reject rock that was intended for the Able's property.

"2. A reasonable person would not have expected to receive a $1,000.00 consideration in exchange for right-of-way property appraised at $86.00. The appraised value was known to the Able's prior to signing the easement deed and was apparently never disputed by them. The four loads of reject rock had a value of about $80.00, approximately equal to the appraised value of the right-of-way property."

In addition to the $1,000 claimed to represent the value of the quantity of crushed rock needed to completely cover his parking lot, Mr. Able is also claiming $1,000 for attorney's fees and $3,000 for loss of business resulting from interference with the flow of traffic to his store due to construction of the road in a manner which violated his agreement with the Forest Service. The balance of the $10,000 claim is for "other general damages," the nature of which is not specified.

As pointed out in the certifying officer's submission, the only possible legal basis of which we are aware that might justify payment of any portion of the claim, although not specifically identified as such in the damage claim submitted to the Forest Service on behalf of the Ables, is one of estoppel. Essentially, under this theory the estoppel would arise because the Ables were induced to grant the United States an additional easement across their property in return for the consideration of $1 set forth in the easement deed, even though they had been advised of the $86 appraised value of the easement, in reliance on the promise by a Forest Service official that they would be furnished some quantity of crushed rock (the precise amount being in dispute) to compensate them for the easement. Initially, we might point out that it has long been held that an oral agreement purporting to transfer an interest in real property is not enforceable. However, the existence of the written easement deed clearly demonstrates that the parties did in fact intend a formal conveyance of the property interest. The oral agreement, if it is admissible to consider it under these circumstances, constitutes parol evidence that the consideration of $1 recited in the deed was not in fact the total consideration.

It has generally been held that where the parties to a contract express their agreement in writing which on its face appears to be complete, a conclusive presumption arises that the writing does in fact contain the entire agreement between the parties. Therefore, the apparent intention of the parties as indicated by the language contained in the written contract cannot ordinarily be contradicted or supplemented by parol evidence of any prior or contemporaneous oral discussion or declarations that might tend to suggest a contrary intention. This rule is based on the view that whenever a formal written contract is executed, all prior or contemporaneous negotiations are incorporated in and superseded by the written agreement. See 30 Am. Jur. 2d Evidence § 1016. However, we do not

believe, for several reasons, that this parol evidence rule should be applied in this case so as to preclude us from considering the oral assurances that were made to Mr. Able by the District Ranger, notwithstanding the execution of the subsequent written agreement.

First, the parties all agree that Mr. Able was promised some quantity of crushed rock and that he signed the easement deed in reliance on those assurances. Of more significance, in our view, is the fact that the written contract provided for only the nominal sum of $1. In fact, the $1 was not actually paid to the Ables until almost 2 years after the deed was signed, and was only paid at that time after Mrs. Able complained that Mr. Ables had never received it. Had the written deed provided for other than nominal consideration to be paid the Ables, we might have been inclined to agree that any prior oral agreement or promise of other consideration had been merged in and superseded by the formal document especially since there is written evidence that the full fair market value of the easement was tendered to the Ables in conformance with the requirements of 42 U.S.C. § 4651, supra, prior to the signing of the deed. However, in this case, there was no reason to believe that the Ables intended to make a gift of their property to the Federal Government. There appears to be an exception to the general rule in such cases which would allow an intent to provide additional consideration to be proved by parol evidence, especially where only a nominal sum is specified in the contract. See Crow v. Crow, 66 Wash. 2d 108, 401 P. 2d 328 (1965); and Apple v. McCullough, 239 Ky. 74, 38 S.W. 2d 955 (1931). Also see 30 Am. Jur. 2d Evidence § 1056 and 23 Am. Jur. 2d Deeds § 73 as well as other cases cited in those sections.

Traditionally, the courts have been reluctant to apply the doctrine of estoppel against the Federal Government or one of its agencies and have generally held that the Government is not subject to the same rules of estoppel as are private parties. See B-181432, February 19, 1976, and court cases cited therein. As suggested in the submission, this judicial reluctance is based on the view that, because of sovereign immunity, the Federal Government is not responsible for the unauthorized acts of its agents. Thus, in the case of Utah Power & Light Co. v. United States, 243 U.S. 389, 409 (1917), the Supreme Court said 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 * * *." Also see Federal Crop Insurance Corporation v. Merrill, 332 U.S. 380 (1947). Our Office has often relied on this rationale. See 54 Comp. Gen. 271 (1974); 46 Comp. Gen. 348 (1966); 44 Comp. Gen. 337 (1964); B-184130, July 3, 1975; B-182730, May 20, 1975; and other cases cited in those decisions.

Notwithstanding the foregoing, an estoppel argument has been successfully employed against the United States in certain circumstances. For example, in the leading case of United States v. Georgia Pacific Company, 421 F. 2d 92 (9th Cir. 1970) the following essential elements of estoppel were applied in a case involving the United States: (1) the party to be estopped must know the facts; (2) he must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended; (3) the latter must be ignorant of the true facts; (4) he must rely on the former's conduct to his injury. See also Emeco Industries, Inc. v. United States, 485 F. 2d 652, 202 Ct. Cl. 1006 (1973). Our Office has recognized and applied this same 4-step test in determining whether or not an estoppel can be established against the Government. Thus see 55 Comp. Gen. 911 (1976); 53 Comp. Gen. 502 (1974), and B-181432, February 19, 1976. For the reasons set forth hereafter, we believe that all of the aforementioned elements of estoppel are present in the instant case and, therefore, it is our view that the Forest Service is estopped from denying the existence of an oral understanding between itself and Mr. and Mrs. Able to provide them with some quantity of crushed rock to be placed in the store parking lot. (The question as to the quantity of rock so promised the Ables, and its monetary value, will be discussed in the latter portion of this decision.)

First, with respect to the question of whether the Government, as the party to be estopped, was aware of the facts when its official representative agreed to the exchange, i.e., that a promise had been made which was prohibited by restrictions in the Forest Service Manual, we believe that it was. The Forest Service, as the author of the Forest Service Manual, as well as its employees, is of course charged with constructive knowledge of the provisions contained therein. Based on the information contained in the documents enclosed with the certifying officer's submission, it appears that the District Ranger who agreed to the exchange of crushed rock for the right-of-way was specifically aware that such an arrangement was not permitted under Forest Service directives and admits to acting against the advice of the Forest Service Right-of-Way specialist when he entered into the agreement.

Secondly, the record clearly demonstrates that the Government, acting through its official representative, agreed to the exchange with the intent and expectation that the Ables would thereby be induced to grant the desired easement to the Government. In this regard, an investigation conducted by the Forest Service into the circumstances surrounding the acquisition of this right-of-way indicated, on the basis of interviews with the different individuals involved, that a decision had been made at a Forest Service District staff meeting to pursue the trade informally with the Ables in order to expedite acquisition of the

property. Moreover, the District Ranger involved specifically stated that the basis for consummating the acquisition for $1 was the existence of the oral agreement.

With respect to the issue of whether or not the Ables were ignorant of the facts when they agreed to the exchange, i.e., that such exchanges were specifically prohibited by a provision in the Forest Service Manual, there is no information in the record that might suggest that they had any actual knowledge of the restriction. We recognize that actual knowledge of a prohibition is not always required. Individuals are on constructive notice of a prohibition if it is set forth in statutory regulations, especially if it is published in the Federal Register. Such constructive notice is generally deemed adequate to bar an estoppel defense. Thus in the case of Federal Crop Insurance v. Merrill, supra, which is the leading judicial precedent in this regard, the Supreme Court held that statutory regulations, published in the Federal Register, limiting crop insurance provided by a Government corporation, were binding, even though a corporation agent had advised claimants that they had insurance coverage beyond the scope of the regulations and the claimants were unaware that the regulations provided otherwise.

In the instant case, the provision which prohibits the type of exchange agreement involved here is set forth in the Forest Service Manual, which is not published in the Federal Register. Moreover, our Office has specifically held that the Forest Service Manual "is merely an expression of Forest Service policy, 'which does not rise to the status of a regulation.'" B-185199, April 1, 1977, citing Hi-Ridge Lumber Company v. United States, 443 F. 2d 452, 455 (9th Cir. 1971). Therefore, it is clear that this provision is not a statutory regulation. The consistent policy of our Office with respect to non-statutory directives--issued as an expression of executive policy to serve as an internal guide to agency action rather than for the purpose of implementing a statutory authorization--is that they do not have the force and effect of law and do not establish legal rights and duties. See B-164676, March 7, 1969. Also see 55 Comp. Gen. 911 (1976); 43 Comp. Gen. 217 (1963); and 53 Comp. Gen. 86 (1973). Therefore, we do not believe that for purposes of determining whether the doctrine of estoppel applies, Mr. Able can be charged with constructive knowledge of the limitation in question, there being no comparable limitation in either the statute or agency regulations.

With respect to the final element that must be demonstrated in order to successfully employ an estoppel argument, it is clear that Mr. and Mrs. Able did in fact rely, to their detriment, on the promise made to them by the District Ranger that they would receive some crushed rock for their parking lot in return for the right-of-way that was granted to the Government. When the Ables signed the easement deed they were

aware that the property had been formally appraised at a value of $86. Certainly, there is nothing in the record to indicate that they intended to make a gift of this land to the Forest Service. On the contrary, it was implicitly conceded by all of the individuals involved, and was expressly stated by the District Ranger, that the only reason for consummating the acquisition for the nominal consideration of $1 recited in the deed was the oral agreement to provide the Ables with additional compensation in the form of crushed rock.

Under the circumstances, the Government should not be allowed to benefit by disavowing the improper act of its agent who knew that the agreement he made was unauthorized. Accordingly, since the necessary elements of estoppel are present, it is our view that the Government is estopped from denying the existence of an oral agreement with the Ables that they would receive some quantity of crushed rock for their parking lot.

We next consider the questions of the quantity and value of crushed rock promised to the Ables. The District Ranger who agreed to the exchange and another Forest Service official who was aware of the arrangement have stated that the Ables were promised approximately four loads of "reject rock," worth about $80, to be placed in the area in front of Mr. Able's store. The District Ranger has specifically stated that although he knew the "swap" was not necessarily legal, he rationalized his approval thereof on the ground that the "tradeoffs were equal in value and the public's interests were being protected." On the other hand, Mr. Able claims that he was promised sufficient crushed rock to cover the parking lot, the cost of which has been estimated to total about $1,000. However, Mrs. Able in an interview with Forest Service employees, is reported to have conceded that they were only to receive reject rock left over from the crushing operation. As stated by the Certifying Officer in his submission, reject rock refers to that quantity of crushed rock, approximately equal to four truck loads, that is produced in a normal crushing operation before the crusher begins to meet road construction specifications. (This is also consistent with the term "extra gravel" that was stated on the application the Ables filed with the FmHA requesting subordination of FmHA's lien on their property.) Our Office has generally held that when there is a factual dispute between the claimant on the one hand, and the administrative officer and its employees, on the other, we must rely on the official representations in the absence of evidence sufficient to overturn the presumption of correctness of the reports and administrative determinations. See B-153797, March 29, 1966, and B-178280, August 6, 1973.

Of equal significance in this case, is the fact that when the oral assurances were made to the Ables that they would receive some quantity

of crushed rock, they were aware that the property involved had been appraised at a value of $86. As indicated earlier, the basis for any estoppel argument is reasonably justified reliance on official misrepresentations. We believe, as stated in the submission, that it clearly would not have been reasonable for a person to expect to receive a $1,000 consideration in return for a right-of-way known to be worth $86.

Accordingly, it is our view that the accurate measure of contract damages in this case is the $86 appraised value of the property. This, of course, is consistent with the benefit received by the Government under a theory of unjust enrichment since it received property worth $86, but only paid $1 in consideration. Therefore, with respect to this portion of the Ables' claim the proper amount to be certified for payment, taking into consideration the $1 that was already paid to them, is $85.

With respect to the Ables' claim, for attorney's fees, it has consistently been held that allowance of attorney's fees to a claimant against the United States is unauthorized in the absence of any express statutory provision. See 37 Comp. Gen. 485, 487 (1958); and 49 Comp. Gen. 44, 47 (1969), as well as court cases cited in those decisions. Therefore, the claim for $1,000 representing attorney's fees is disallowed.

As to the remaining elements of the Ables' claim for business and other general unspecified damages, we express no opinion since the Forest Service has the initial responsibility for determining whether any such loss actually did occur and, if so, whether the loss resulted from the breach of any promise by the Forest Service.

In accordance with the foregoing, it is our conclusion that the instant claim should be approved for payment in the amount of $85.

Paul G. Dembling

For the Comptroller General
of the United States