

BRYANT W. CONWAY

IBLA 93-132

Decided May 6, 1996

Appeal from a decision of the Eastern States Office, Bureau of Land Management, declining to take any action with respect to an asserted homestead claim on lands patented to a railroad. LA BLM 091834 LB.

Affirmed as modified.

1. Act of February 8, 1887--Administrative Procedure:
Generally--Patents of Public Lands: Generally--Railroad
Grant Lands

Under the provisions of the Act of Feb. 8, 1887,
24 Stat. 391, the Department was vested with
authority to adjudicate claims made by homestead
settlers

on lands patented to the New Orleans Pacific Railway
Company. Where the record on appeal indicates that the
only claim ever made by a homestead settler was duly
approved by the Department in accordance with the
settler's claim, a subsequent assertion by a successor-
in-interest that additional lands should have been
included within the allowed entry will not
be entertained.

2. Federal Land Policy and Management Act of 1976:
Correction of Conveyance Documents--Patents of Public
Lands: Corrections

An application for correction of a patent which seeks
to include in that patent other lands which have been
patented to third parties may not be approved absent
the consent of all owners of the lands involved.

APPEARANCES: Bryant W. Conway, Esq., Baker, Louisiana, pro se.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

Bryant W. Conway has appealed from a decision of the Eastern States Office, Bureau of Land Management (BLM), dated November 24, 1992, declining to take any action with respect to lands patented to the New Orleans Pacific Railway Company (New Orleans Pacific) which had been allegedly settled under the homestead laws by appellant's great-grandfather. For reasons which we set forth, infra, we affirm.

Appellant asserts that he is the great-grandson of one Wietch Whatley, a settler under the homestead laws who, pursuant to an entry (No. 25080) made on October 10, 1902, obtained a patent for 80 acres of land, described as the N $\frac{1}{2}$ NW $\frac{1}{4}$ sec. 13, T. 1 S., R. 2 W., Louisiana Meridian, Rapides Parish, Louisiana, on December 1, 1902. Appellant notes that the land adjacent to the land patented to Whatley, *i.e.*, the S $\frac{1}{2}$ NW $\frac{1}{4}$ sec. 13, had previously been patented to the New Orleans Pacific on December 28, 1892, pursuant to the Act of February 8, 1887, 24 Stat. 391. Appellant asserts that Whatley's residence 1/ was not located within the limits of the lands patented to him but rather was situated in the S $\frac{1}{2}$ NW $\frac{1}{4}$ sec. 13, within the limits of the lands patented to the New Orleans Pacific. Though appellant was less than clear as to precisely what action he sought from BLM, it seems reasonably plain from his submissions that he expected BLM to somehow rectify the exclusion of the Whatley home site from the original patent. 2/

As noted above, by decision dated November 24, 1992, the Eastern States Office declined to take any action. Though the decision which issued in this case is scarcely a model of clarity, the ostensible basis for the denial by BLM was the oft-repeated maxim that, where the legal title to land under dispute is no longer in the United States, the Department of the Interior lacks authority to adjudicate conflicting claims thereto. While this venerable precept finds its origins in the Supreme Court decision in Germania Iron Co. v. United States, 165 U.S. 379, 383 (1897), and has been repeatedly recognized both by Federal courts (*see, e.g., Southern Pacific R. Co. v. United States*, 51 F.2d 873 (9th Cir. 1931); Sage v. United States, 140 F. 65 (8th Cir. 1905)), as well as this Board (*see, e.g., Eddie S. Beroldo*, 123 IBLA 156, 158 (1992); Lone Star Steel Co., 101 IBLA 369, 374 (1988)), it is not without qualification.

Thus, in Aguilar v. United States, 474 F. Supp. 840 (D. Alaska 1979), the District Court held that, where the land sought by a Native allotment applicant had been previously conveyed out of Federal ownership and, therefore, was no longer subject to the Department's adjudicatory jurisdiction,

1/ The original Whatley home is no longer standing, though appellant avers that a concrete slab foundation evidences its original location.

2/ While the documents which appellant has submitted would indicate that, based on the controlling 1877 resurvey by John Kap, the Whatley residence would have been located in the NW $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$ sec. 13, appellant is clearly interested in asserting title to the entire S $\frac{1}{2}$ NW $\frac{1}{4}$ of sec. 13 based on the asserted exclusion of the Whatley residence from the homestead patent. Indeed, no other interpretation is plausible since, from the evidence which appellant has submitted, it appears that appellant is already the owner of the NW $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$ sec. 13 and, therefore, is presently the owner of the site of the original Whatley homestead.

the Department nevertheless retained the responsibility of making an initial determination as to the validity of the allotment claim as a prerequisite to deciding whether or not the Government should bear the burden of going forward with a suit to annul the patent and thereby restore adjudicatory jurisdiction over the land in question to the Department. As we shall show, the instant case involves another area of the law in which the general precept foreclosing Departmental actions with respect to patented lands is subject to qualification. In order to understand the nature of the exception involved herein, it is necessary to briefly review both the background leading to the adoption of the Act of February 8, 1887, 24 Stat. 391, as well as certain provisions of that Act.

In 1871, Congress had enacted a grant to the New Orleans, Baton Rouge, and Vicksburg Railroad Company of odd-numbered sections situated within 20 miles of either side of a railroad line (the primary limits) to be constructed from New Orleans to Shreveport within 5 years of the date of the grant. This grant was subject to certain exceptions including one which excluded any lands within a preemption or homestead claim which had attached as of the time that the road was definitely located. A map showing the general route of the proposed railroad was filed with the Department of the Interior in November 1871 and, in December 1871, the Secretary of the Interior withdrew all lands within the primary limits of the road as shown on the map.

On January 5, 1881, having failed to construct any part of the railroad, the original grantee transferred the grant to the New Orleans Pacific, which had already completed a line between New Orleans and Whitecastle. By the end of 1882, the New Orleans Pacific had extended the line to Shreveport and had filed the second of two maps showing the definite location of the road. ^{3/} The road was eventually accepted and it was determined by the Secretary of the Interior that the New Orleans Pacific had earned an entitlement to patent for those lands falling within the terms of the grant lying opposite the road from Whitecastle to Shreveport. In 1885, patents for a large part of the lands involved were issued. Challenges to the Department's actions were raised, however, arguing that the original grant was not assignable and that, even if it were held to be assignable, the grant by its own terms required the completion of the railroad within 5 years, i.e., by March 3, 1876, and that this condition had not been met. Concerned with the growing controversy, the Secretary ultimately suspended issuance of patents and requested that Congress consider the propriety of adopting an act to cure any defect which might exist with respect to the New Orleans Pacific's entitlement under the 1871 Act.

Congress ultimately acceded to the Secretary's entreaties and adopted the Act of February 8, 1887, 24 Stat. 391. By its terms, section 2 of

^{3/} The first map had been filed on Oct. 27, 1881, and the second on Nov. 17, 1882. It appears that, insofar as the instant parcel is concerned, the relevant date of definite location was Oct. 27, 1881. See Instructions, 5 L.D. 686, 687 (1887).

this Act confirmed the New Orleans Pacific's title to the lands originally granted to the New Orleans, Baton Rouge, and Vicksburg Railroad Company, located in accordance with the two maps filed with the Department, subject to one important proviso:

That all lands occupied by actual settlers at the date of the definite location of said road and still remaining in their possession or in the possession of their heirs or assigns shall be held and deemed excepted from said grant and shall be subject to entry under the public land laws of the United States.

Section 4 of the Act established the duty of the Secretary

to establish such rules and regulations as to enable all persons who on the first day of December, eighteen hundred and eighty-four, were in the actual occupancy of any of the lands * * * and who are * * * entitled to make homestead or preemption entry on public land * * * to secure titles to the lands so held by them.

This section expressly noted that it was "the intention of this section to protect the settlers upon said lands."

Finally, section 6 of the Act provided:

That the patents for the lands conveyed herein that have already been issued to said company be, and the same are hereby, confirmed; but the Secretary of the Interior is hereby fully authorized and instructed to apply the provisions of the second, third, fourth and fifth sections of this act to any of said lands that have been so patented, and to protect any and all settlers on said lands in all their rights under the said sections of this act. [Emphasis supplied.]

[1] As can be seen from the foregoing, the provisions of the Act of February 8, 1887, supra, did not merely authorize but affirmatively compelled the Secretary to protect the rights of settlers in actual occupancy even where the lands involved had already been patented to the New Orleans Pacific. ^{4/} In a series of Departmental and Federal court adjudications, it was determined that the provisions of the Act applied to all lands within both the primary and indemnity limits of the grant (see, e.g., United States v. New Orleans Pacific Ry. Co., 248 U.S. 507, 515 (1919); Victorien v. New Orleans Pacific Ry. Co. (On Review), 10 L.D. 637 (1890)). Moreover, the right of the United States to both adjudicate homestead claims notwithstanding the fact that the land had been patented to the railroad and, if convinced of their validity, to sue for the establishment

^{4/} Moreover, under the Act of Mar. 2, 1896, 29 Stat. 42, the Department was additionally charged with investigating the claims of those who asserted that they were bona fide purchasers of railroad grants before initiating any suit to annul a patent erroneously issued.

of a constructive trust 5/ was repeatedly recognized by Federal courts, even in those situations in which the railroad had subsequently conveyed the lands to a third-party. 6/ See, e.g., United States v. New Orleans Pacific Ry. Co., 52 F.2d 246 (W.D. La. 1931), aff'd sub nom. Opelousas-St. Landry Securities Co. v. United States, 66 F.2d 41 (5th Cir. 1933); Edenborn v. United States, 5 F.2d 814 (5th Cir. 1925). Thus, the mere fact that the lands sought herein had been patented to the New Orleans Pacific under the provisions of the 1887 Act and were no longer in Federal ownership would not, in and of itself, be preclusive of an inquiry by the Department as to the circumstances surrounding the issuance of the patent to the railroad, if the settler's claim was otherwise cognizable under the Act.

The problem in the instant case is that Wietch Whatley, appellant's asserted predecessor-in-interest, never made a claim under the 1887 Act for any acreage other than the 80 acres of land which he identified as the N $\frac{1}{2}$ NW $\frac{1}{4}$ sec. 13. The fact that Whatley had abandoned an earlier entry (No. 22909) made on May 15, 1901, which had embraced 160 acres of land described as the S $\frac{1}{2}$ SE $\frac{1}{4}$ sec. 7 and the W $\frac{1}{2}$ NE $\frac{1}{4}$ sec. 18, T. 9 N., R. 3. E., has simply no relevance to the question as to the extent of his claim in sec. 13, T. 1 S., R. 2 W. 7/ Nor is it of any particular

5/ While, at the time of the adoption of the 1887 Act, the United States was vested with relatively unfettered authority to file suit to annul patents erroneously issued, a general provision limiting the time for the Government's initiation of a suit to annul a patent to 6 years of its issuance was adopted in the Act of Mar. 3, 1891, 26 Stat. 1093, 43 U.S.C. § 1166 (1994). This limitation was expressly applied to patents issued under a railroad grant by the Act of Mar. 2, 1896, 29 Stat. 42. However, the fact that a suit to annul a patent was time-barred did not otherwise preclude a suit seeking the establishment of a constructive trust. United States v. New Orleans Pacific Ry. Co., supra at 518.

6/ Though a showing that a third-party was a bona fide purchaser would defeat a Government suit seeking to annul the patent (see n.4, supra), it was difficult, except where the land had been conveyed to the third-party prior to the Act of Feb. 8, 1887, for a third-party to establish this fact where the settler was in open possession of the lands involved at the time of the patent since, as the Supreme Court noted, "[i]ntending purchasers were bound to take notice of the occupancy of the settlers, and this, with the Act of 1887, which was a public law, renders untenable the claim that those who hold the title under the patent have the status of bona fide purchasers." United States v. New Orleans Pacific Ry. Co., supra at 520. See also McNary Lumber Co. v. United States, 6 F.2d 864, 865 (5th Cir. 1925), "In view of the fact that a homestead claimant is not limited to the quarter section on which improvements are made, it is incumbent upon those who purchase lands to ascertain the boundaries of the settler's claims."

7/ In fact, the land embraced in Whatley's original entry does not appear to have even been within the primary or indemnity limits of the New Orleans Pacific grant.

relevance that Whatley may have used and cultivated lands adjacent to those for which he applied.

While it is true that, under various rulings, a settler's claim was not limited to only those quarter-quarter sections on which improvements were located (see McNary Lumber Co. v. United States, 6 F.2d 864, 865 (5th Cir. 1925)), absent the existence of an openly asserted claim for such land, the fact that a settler used lands adjacent to other land claimed by him did not serve to extend his claim to the used lands. See Edenborn v. United States, *supra* at 815. It was the assertion of a claim to land within the limits of the grant to the New Orleans Pacific based on occupancy and use under the homestead laws which was the essential prerequisite for entitlement under the 1887 Act.

Admittedly, Whatley did make a claim under the 1887 Act. But, of his own volition, he limited his claim to 80 acres, viz., the N $\frac{1}{2}$ NW $\frac{1}{4}$ sec. 13. Whether or not he could have asserted a claim to the S $\frac{1}{2}$ NW $\frac{1}{4}$ sec. 13 at the same time, the essential fact is that he did not do so. The fact that he expressly limited his homestead entry to 80 acres must be seen as a repudiation of any contention that, in addition to the 80 acres included in the N $\frac{1}{2}$ NW $\frac{1}{4}$ sec. 13, Whatley had met the qualifications for asserting a claim to an additional 80 acres in the S $\frac{1}{4}$ NW $\frac{1}{4}$ sec. 13. Absent proof that Whatley ever asserted such a claim, there can be no relief under the 1887 Act. 8/

[2] As is clear from the foregoing, appellant has presented nothing which might show that Whatley ever asserted a claim to a total of 160 acres within the NW $\frac{1}{4}$ sec. 13. What appellant has shown, however, is a real possibility that, owing to the timbered nature of the tract at the time of entry, Whatley may have misdescribed the 80 acres which he intended to enter and, therefore, the patent which issued erroneously described the land he sought. Correction of an alleged error in a conveyancing document, however, is not properly cognizable under the Act of February 8, 1887, *supra*; rather, it is properly sought pursuant to an application filed under section 316 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1746 (1994). 9/ There are, however, two impediments to favorable consideration of such an application.

8/ In light of this conclusion, we need not explore the subsidiary question concerning whether or not any claim by Whatley and his successors-in-interest would be barred by the imposition of the defense of laches. As the Supreme Court noted in United States v. New Orleans Pacific Ry. Co., *supra*, while the defense of laches is not normally available against the United States, where the United States sues on behalf of a private person "his laches may be interposed with like effect as if he were suing." *Id.* at 519, citing United States v. Beebe, 127 U.S. 338 (1888).

9/ This section provides:

"The Secretary may correct patents or documents of conveyance issued pursuant to section 1718 of this title or to other Acts relating to the disposal of public lands where necessary in order to eliminate errors. In

First of all, the land in the S½ NW¼ sec. 13 was patented to the New Orleans Pacific in 1892. Under the applicable regulations, 43 CFR 1865.3, administrative changes in existing patents can only occur if all existing land owners agree. See Lloyd Schade, 116 IBLA 203, 209 (1990); Lone Star Steel, *supra*. There is absolutely no indication that, except for appellant, any of the present owners of the S½ NW¼ sec. 13 would assent to such a patent amendment. Absent such an agreement, the amendment could not be approved.

Secondly, as noted above, the putative error which would be corrected would be Whatley's misconception as to the proper description of the land he sought, which he described as embracing two quarter-quarter sections, *i.e.*, 80 acres. To the same extent, therefore, that his application failed to describe land which he intended to claim in the S½ NW¼ sec. 13, his application must be presumed to have erroneously embraced lands in the N½ NW¼ sec. 13. In other words, any redescription which effectively moved the entry south along its southern boundary must be deemed to have a reciprocal effect of moving the northern boundary an equal distance south. There is no suggestion in the present record that appellant would be amenable to such a diminution in his patented lands along their northern boundaries. Indeed, it seems from the record that there may be on-going litigation concerning the extent of appellant's ownership interest of the northernmost portion of the patented lands. Until this was resolved, no favorable action could possibly be contemplated for the reasons set forth above.

In light of the foregoing, it is clear that the determination of the Eastern States Office not to take any action with respect to appellant's claim was altogether appropriate.

Therefore, 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 as modified for the reasons stated above.

James L. Burski
Administrative Judge

I concur:

Bruce R. Harris
Deputy Chief Administrative Judge

fn. 9 (continued)

addition, the Secretary may make corrections of errors in any documents of conveyance which have heretofore been issued by the Federal Government to dispose of public lands."