

STEVEN L. ABEL, TRUSTEE OF THE ERMA TOMALINO TRUST

IBLA 2002-54

Decided December 28, 2004

Appeal from a decision of the Milwaukee Field Office, Bureau of Land Management, rejecting a claim under the Minnesota Public Lands Improvement Act of 1990. MNES-049337.

Reversed.

1. Public Sales: Sales Under Special Statutes--Surveys of Public Lands: Omitted Lands

Under the Minnesota Public Lands Improvement Act of 1990, Pub. L. No. 101-442, Congress intended to divest the United States of ownership of a multitude of unmanageable small islands and upland areas generally omitted from the original surveys of Minnesota, and authorize conveyance either to the State or to persons claiming ownership of those lands. The Act requires only that a claimant make a good faith assertion of ownership that is meritorious. The Bureau of Land Management's rejection of a claim under the Act, based upon the application of a limited number of particular factors as the exclusive evidence of a good faith assertion of ownership, is properly reversed where a claimant produces other credible evidence of a good faith assertion of ownership.

APPEARANCES: David A. Barnes, Esq., Minneapolis, Minnesota, for Appellant.

OPINION BY CHIEF ADMINISTRATIVE JUDGE HOLT

Steven L. Abel (Appellant), Trustee of the Erma Tomalino Trust, has appealed from a decision dated August 13, 2001 (Decision), by the Milwaukee Field Office, Bureau of Land Management (BLM), rejecting his application, MNES-049337, to acquire a tract of land pursuant to the Minnesota Public Lands Improvement Act of 1990 (Minnesota Act), Pub. L. No. 101-442, 104 Stat. 1020. BLM rejected the

application for failing to establish a “reasonable belief of ownership” of the land based on Appellant’s failure to meet certain BLM criteria. Appellant timely appealed BLM’s Decision.

The land claimed by Appellant consists of a small island, encompassing approximately one-half acre, located in Star Lake and described as Tract 37, Government Lot 3, sec. 1, T. 131 N., R. 32 W., 5th Principal Meridian, Todd County, Minnesota. Government Lot 3 is a tract of land on the mainland shore of Star Lake.^{1/} Appellant holds a deed to Government Lot 3. Appellant asserts ownership of island Tract 37 as a part of Government Lot 3, under Minnesota law. The island was omitted from the original survey of the township.^{2/}

Federal surveys of several midwestern states during the 1800s omitted many small islands in rivers and lakes, particularly Michigan and Minnesota. Because surveying such islands was expensive and time-consuming, the governing survey instructions often restricted the surveys to larger islands, for example, those “suitable for cultivation.” Small islands, such as the one at issue here, remained unsurveyed not necessarily because they went unnoticed, but because it was too inconvenient and expensive to survey them.^{3/} The surveyed lands generally were conveyed to states, often for the purpose of constructing railroads, and many of those lands eventually found their way into private hands. With respect to omitted (unsurveyed) islands, state law frequently provided that owners of the shoreline (riparian owners) own to the middle of the stream or lake. See, e.g., Schurmeier v. The St. Paul and Pacific Railroad Co., 10 Minn. 82 (1865). So riparian owners often claimed ownership of omitted islands. Such was the case with the island at issue here.

^{1/} Government Lots 1 and 2 also are shoreline lots within sec. 1 that are deeded to Appellant. However, island Tract 37 is most closely associated with Government Lot 3.

^{2/} The surveying district of Minnesota was established in 1857, and surveys of the State began that year. Historical Highlights of Public Land Management 28 (1962). The original survey of T. 131 N., R. 32 W., was conducted in 1858, the year Minnesota was admitted as a state into the United States. The record includes a copy of the survey plat approved Feb. 12, 1859. Although the island was omitted from the survey, the plat clearly shows the surveyors were aware of the island located in Star Lake, and in existence at the time of Minnesota’s admission as a state.

^{3/} Mr. and Mrs. Thomas J. Dekker, 114 IBLA 302 (1990) (citing C. Albert White’s A History of the Rectangular Survey System 368, describing 1850 Surveyor General instructions for the states of Ohio, Indiana, and Michigan). Later 1864 survey instructions allowed the survey of previously omitted islands if the party requesting the survey paid the cost, because those islands were not valuable enough to justify the government paying the cost of survey. Dekker, 114 IBLA at 302.

In contrast, the Department of the Interior has long held that “[i]slands in existence at the time a State is admitted to the Union * * * whether surveyed or not, remain public land of the United States.” Bernard J. and Myrle A. Gaffney, A-30327 at 7 (1965) (citations omitted). In addition:

The Secretary of the Interior is authorized, and is under a duty, to consider and determine what lands are public lands, what public lands have been or should be surveyed, and what public lands have been or remain to be disposed of by the United States, and this Department, acting for the United States, has the authority to extend or correct the surveys on public lands as may be necessary, including the surveying of lands omitted from earlier surveys.

Id. (citing State of Oregon, 60 I.D. 314 (1949), and cases cited therein).

Consistent with this position, in the 1960s BLM initiated an inventory of public lands, including omitted islands, in several states including Minnesota.^{4/} Later, BLM initiated surveys of unsurveyed lands in those states, including the island at issue in this case. On October 6, 1982, BLM published various notices of filing plats of survey for omitted islands, including the subject island, designated Tract 37, T. 131 N., R. 32 W. Because this omitted island was upland in character, BLM stated “[i]t is, therefore, held to be public land.” 47 FR 44164 (Oct. 6, 1982).

Within several years, Congress recognized that the lake states of Michigan and Minnesota contained many small scattered islands and upland tracts identified as public lands under the jurisdiction of BLM that, although useful primarily for recreation and preservation, were not suitable for inclusion in public reserves (such as national parks or wildlife refuges) and were not suitable for efficient management by BLM. The states were willing to manage such lands, but there was no reasonable mechanism available to allow the states to undertake their management. Also:

[E]lsewhere in Michigan [Minnesota] there are unpatented lands which for many years have been in the possession of parties other than the United States but the title to which is clouded because of claims arising under public land laws or otherwise involving possible Federal residual interests.

Pub. L. No. 100-537, Sec. 1, 102 Stat. 2712 (Oct. 28, 1988) (Michigan); Pub. L. No. 101-442, Sec. 202, 104 Stat. 1020 (Oct. 18, 1990) (Minnesota). Accordingly,

^{4/} The administrative record includes a “Land Inventory Report for Lake States Project” for the subject island within Star Lake, describing location, ownership, occupancy, physical characteristics, and appraisal and cadastral survey data.

Congress passed first the Michigan Public Lands Improvement Act of 1988, and then the Minnesota Act. The purposes of these acts included authorizing the transfer of specified unclaimed islands and uplands and other public lands to the states for public recreation and preservation purposes. In addition, the acts “authoriz[ed] the Secretary of the Interior to resolve claims to certain other public lands [including islands] * * * and to transfer such lands to claimants thereof on terms that recognize the equities of such claimants in such lands.” *Id.* Lands, claims to which were rejected, were to be transferred to the states.

The Minnesota Act contains two standards that must be met before a claim is validated and the land transferred.^{5/} First, the claim must be “a good faith assertion by a party * * * that (1) such party has title to a parcel or tract of land.” Pub. L. No. 101-442, Sec. 203(c), 104 Stat. 1021. Second, the Secretary must determine that the claim is “sufficiently meritorious as to be appropriate for exercise of the Secretary’s discretionary authority.” *Id.* at Sec. 205(d)(1), 104 Stat. 1023.

BLM had notice of a claim to title of Tract 37 after its inventory in 1967. The Land Inventory Report states that the island is in a “land locked lake. All shore line is owned & stringintly [sic] controlled by one family.” The Report notes no improvements on the island, but indicates its seasonal use for fishing and some hunting, and states that “Wilma Salmon [predecessor of Appellant] claims island and states to have paid taxes on same for past 20 yrs. No tax history in county records.”

On January 18, 1991, BLM sent a letter to Salmon concerning her possible claim to ownership of Tract 37, encouraging her to notify BLM if she still claimed ownership. The letter continued:

No special application form is required, but your claim should be in writing and the parcel being claimed should be identified. Your letter should also contain a statement explaining your claim. Supporting documents (e.g., deeds, tax receipts) should not be sent with the initial letter. You will be notified by this office as to the Secretary’s authority for the resolution of your claim. Our goal is to resolve your claim in a manner that will be mutually satisfying to both you and the United States.

BLM presumably discovered soon after sending the letter that Salmon had died in 1970, and title to island Tract 37 had passed to other parties. BLM requested the

^{5/} A claim must be identified in BLM records or filed with BLM within 180 days of enactment of the Act, and the Secretary must notify the claimant, no later than 1 year after enactment, of the Secretary’s authority to transfer title. Pub. L. No. 101-442, Sec. 204(b), 104 Stat. 1021, 1022.

assistance of the Todd County Assessor's Office to find out who County records showed as the current owner. By letter dated March 6, 1991, the Assessor's Office responded to BLM that "after a considerable amount of researching we have determined to the best of our knowledge that the island [Tract 37] is part of Gov. Lot 3 and is owned by Erma Tomalino[o]." Shortly thereafter, BLM made contact with Appellant, Tomalino's nephew and later the Trustee of her Revocable Trust (whose property then included island Tract 37). Tomalino submitted a letter to BLM on April 12, 1991, asserting her ownership of Tract 37 based on a chain of title beginning with a patent from the United States to the State of Minnesota dated June 30, 1903, that included Government Lot 3 in Sec. 1, T. 131 N., R. 32 W. After that, the record reflects no communication between the parties for several years.

By letter dated November 15, 1996, BLM informed Tomalino that it was "ready to begin processing your claim of ownership to this island." The letter referenced the Minnesota Act and stated that to qualify for sale under the Act, "an applicant must have a good faith claim that is sufficiently meritorious to be appropriate for exercise of the Secretary's discretionary authority. Good faith has been defined by Department practice as a reasonable belief of ownership." Tomalino was asked to submit an application form, a deed showing ownership, an equity factors worksheet (to show improvements to the property as equity), and two forms used in Color of Title cases – Form 2540-2 "Conveyances Affecting Claim of Title" and Form 2540-3 "Color-of-Title Tax Levy and Payment Record." In response to BLM's letter, Appellant ^{6/} submitted various documents to BLM, including title abstracts and calculated allocations of the purchase price and property taxes paid with respect to the island, ^{7/} finally submitting a complete application dated February 18, 1999.

On June 25, 2001, BLM sent Appellant a notice that additional documentation was required for his application. This notice restated the statutory standards that must be met for his claim to be upheld (good faith claim that is sufficiently meritorious), and then enumerated four factors BLM would consider in determining whether Appellant had a reasonable belief of ownership:

^{6/} By this time, Tomalino had died and Appellant was Trustee of the Trust that held ownership to Government Lot 3 and, in Appellant's opinion, island Tract 37.

^{7/} Because the island had always been treated together with Government Lot 3, the purchase price and the property taxes were paid on all of the land within Government Lot 3, including the island (according to Appellant). Appellant's allocation of the purchase price and property taxes was calculated based on the relative acreages of the shoreline portion of Government Lot 3 and the island Tract 37.

- a. Does the claimant possess a document which on its face purports to convey a reasonable belief that the claimed land was included in that tract when it was acquired?
- b. Does the claimant hold title to an adjacent tract of land, and is there reasonable belief that the claimed land was included in that tract when it was acquired?
- c. Has there been a substantial investment in cultivation or permanent improvements to the property by the claimant or predecessors?
- d. Has the claimant, his ancestors, or grantors paid real property taxes on land in question?

The letter then stated that only factor “a” would be considered a determinative indication of “reasonable belief of ownership,” and only if the required document predated passage of the Act. Otherwise, it stated, more than one of the remaining factors must be satisfied. BLM continued that the 1995 grant deed submitted by Appellant was insufficient to satisfy factor “a” because it did not predate the Act and because it merely described the Government lots within sec. 1.^{8/} BLM asserted that the Government lots were mainland lots and that the island (identified as Tract 37 in the 1982 survey) was not specifically mentioned in the 1995 deed. BLM also stated that a December 6, 2000, letter from the Todd County Assessor (included in the administrative record) indicated that there were no records specifying that the island itself was being taxed separately. BLM concluded that the application was deficient with respect to factors “a” and “d” and that additional information was required to confirm that factors “b”^{2/} and “c” (substantial improvements) were both satisfied. BLM requested that the additional information be provided within 30 days, or the claim would be subject to rejection.

Appellant did not respond to this request, and on August 13, 2001, BLM issued its Decision rejecting Appellant’s claim to Tract 37 for failing to meet the criteria for a claim under the Minnesota Act. Appellant timely filed his Notice of Appeal, and later submitted a Statement of Reasons. In his Statement of Reasons, Appellant makes two assertions: first, that title to the island passed to claimant’s predecessors by way of the original railroad grant that conveyed entire sections and was intended to convey minimal islands to the railroad; and second, that the island Tract 37 was

^{8/} Government Lots 1, 2, and 3 include virtually all of the north and east shore of Star Lake, with portions of Government Lot 3 being in the closest proximity to the island Tract 37. All of these lots are owned by Appellant.

^{2/} Because Appellant holds deeds to Government Lots 1, 2, and 3, we presume that BLM sought additional information about Appellant’s reasonable belief that island Tract 37 was included in Government Lot 3.

omitted from the original 1857 survey of the township, and Appellant reasonably believed that title passed to his predecessors under the principles of the decision in Wolff v. United States, 974 F.2d 702 (6th Cir. 1992). BLM did not answer Appellant's Statement of Reasons.^{10/}

The Wolff decision cited by Appellant arose from an appeal of this Board's decision in Olive Wheeler, 108 IBLA 296 (1989), in which we affirmed BLM's dismissal of a protest of a determination of public land status for a small island in the State of Michigan, omitted from the original 1839 and later 1852 surveys of the involved township. The riparian tract to which ownership of the island would have attached under State law was conveyed to the State of Michigan as part of the alternate sections of land granted to the State to aid construction of railroads. Id. at 296-97. The Board confirmed the Department of the Interior's long-held posture that

an unsurveyed island, whether located in navigable or nonnavigable waters, remains public domain, does not pass with the bed under the water to a state upon statehood or convey with a grant of riparian land, and may be surveyed and disposed of by the United States.

Id. at 301. The Board's decision was overruled by the Federal District Court in Wheeler v. United States, 770 F. Supp. 1205 (W.D. Mich. 1991), and the District Court's decision was upheld by the Wolff court.

The Wolff court found substantial support for the proposition that "grants of the government for lands bounded on streams and other waters, without any reservation or restriction of terms, are to be construed as to their effect according to the law of the State in which the lands lie." Wolff, 967 F.2d at 224 (quoting Hardin v. Jordan, 140 U.S. 371, 384 (1890), and citing other Supreme Court decisions). Wolff then states that "[w]hether the United States intended that particular islands be surveyed is a factor of considerable significance, the caselaw indicates, in determining intent as to title." Id. at 225, and cases cited therein.^{11/} Factors cited by

^{10/} A party served with a statement of reasons has 30 days to answer that statement and state why the appeal should not be sustained. However, such an answer is not required, and failure to file an answer will not result in a default. 43 CFR 4.414.

^{11/} Wolff distinguishes the cases of Moss v. Ramey, 239 U.S. 538 (1916), and Scott v. Lattig, 227 U.S. 229 (1913), that found that unsurveyed islands were retained by the United States when the shoreline was conveyed. In those cases, the islands were large in size (in the Moss case, the island was larger than the shoreline lands surveyed and conveyed) and should have been surveyed, but were left unsurveyed because of the surveyor's error. Wolff, 967 F.2d at 225. In contrast, there was no

(continued...)

the Wolff court in determining the intent of the United States with respect to such islands include their small size and insignificant value at the time the shoreline was conveyed, whether the United States treated them as public land, and whether the United States reserved access to the islands when the shoreline was conveyed.^{12/} Id. at 225-26. Wolff then states that “where no contrary intent can be shown, ‘[w]hatever incidents or rights attach to the ownership of property conveyed by the government will be determined by the States.’” Id. at 226 (quoting State Land Bd. v. Corvallis Sand & Gravel Co., 429 U.S. 363, 380 (1977), and other Supreme Court decisions). Because Michigan property law states that a government patent to shoreline lands conveys all islands to the middle of the water, unless the islands were previously surveyed as government subdivisions or the government expressly reserves them, Wolff concluded that the small unsurveyed island at issue was conveyed with the shoreline lands. Id.

The Tenth Circuit Court of Appeals later cited the Wolff decision with favor, together with the Court of Federal Claims decision in Bourgeois v. United States, 545 F.2d 727 (Cl. Ct. 1976), in holding that unsurveyed islands were included in a grant of shoreline lands when there was no indication of intent to retain them in government patents, based upon Colorado law. Koch v. U.S. Dept. of Interior, 47 F.3d 1015 (10th Cir.), cert. denied, 516 U.S. 915 (1995).^{13/}

Following issuance of the Wolff and Koch decisions, BLM apparently acquiesced, reconsidering its policy regarding omitted islands in the State of Michigan, and determining that “the United States no longer has jurisdiction to sell islands to qualified claimants or to transfer islands to the State of Michigan.” 63 FR 40729 (July 30, 1998) (Notice of Disclaimer of Interest). The United States then

^{11/} (...continued)

surveyor’s error in Wolff. The survey instructions required the survey of islands suitable for cultivation, the island at issue was less than 1 acre, “and the circumstances are not such as to suggest that the United States intended to retain the island when it parted with Lot 2.” Id.

^{12/} With respect to island Tract 37, it was small and insignificant in value in 1858. For more than 100 years the United States never treated it as public land (taking notice only during the 1967 Lake States Project land inventory), and the United States did not reserve access to the island when the shoreline was conveyed. These facts are on all fours with the Wolff case facts, and strongly suggest that, under the Wolff analysis, ownership of the island should lie with the shoreline owner, according to Minnesota law. See, e.g., Schurmeier, supra.

^{13/} The Koch case began, similar to the Wolff case, with a Board decision, this time in Exxon Corp., 118 IBLA 38 (1994). That Board decision held that unsurveyed islands are not conveyed with patents to the shoreline and remain public lands.

disclaimed any interest in the islands within the State of Michigan that were omitted in original surveys, claims to which had not yet been adjudicated under the Michigan Public Lands Improvement Act.

[1] With the Minnesota Act, Congress intended to divest the United States of ownership of a multitude of unmanageable small islands and upland areas generally omitted from the original surveys of Minnesota, conveying them either to the State or to persons claiming ownership of those lands. The Minnesota Act requires only that a claimant make a meritorious good faith assertion of ownership. However, BLM adjudicated Appellant's claim by requiring that claimants prove their good faith belief in ownership through a limited set of specific factors used in a particular way. Although these factors, including documents of title, payment of taxes, and construction of improvements, reasonably could evidence a good faith belief in the ownership of omitted lands, BLM has articulated no basis for its exclusive use of these particular factors, or for its strict use of these factors only in a particular way.^{14/} We also have difficulty in BLM's application of its own factors. BLM discounted Appellant's deed to Government Lot 3 and its interpretation under Minnesota law that island Tract 37 was included with respect to factor "b," and refused to acknowledge Appellant's showing that, notwithstanding the lack of specificity in Todd County records, Appellant believed he paid property taxes on island Tract 37. In short, BLM was concerned not with Appellant's good faith assertion of ownership, but instead demanded direct, evidentiary proof of ownership. The Minnesota Act neither requires nor even suggests such limitations in determining the nature of a claimant's good faith assertion of ownership. Accordingly, we are not bound by BLM's factors or BLM's method of applying them.

Appellant has asserted his claim to island Tract 37, claiming ownership initially arising from railroad grants conveying alternate whole sections of land, with a chain of title to Government Lot 3 (and, assertedly, island Tract 37) continuing to the present. Evidence of at least twenty previous years of asserted ownership and control of Tract 37 by one family is found in the 1967 BLM Land Inventory report on the island. In 1991, in response to an inquiry from BLM, the Todd County Assessor's

^{14/} In adjudicating Appellant's claim, BLM may have utilized guidance in the form of an Instructional Memorandum (IM) Number ES-91-20 entitled "Procedures for Processing of Claims Under the Minnesota Public Land Improvement Act of 1990, P.L. 101-442, 104 Stat. 1019." The IM, issued on Mar. 14, 1991, with an expiration date of Sept. 30, 1992, established criteria for application procedures for claimants, processing actions, calculation of purchase price, issuance of decisions and patent, and evaluation of the quality of the claim. The IM's discussion of the quality of the claim includes the 4 factors cited by BLM in its Decision and the way they should be used. However, this guidance document similarly provides no authority or rationale for the exclusivity of the identified factors or for their directed use.

Office indicated its conclusion that island Tract 37 was owned by Appellant's predecessor. Appellant submitted credible evidence of purchase price and property tax allocations consistent with ownership of the island.^{15/} This history of asserted ownership, coupled with his awareness of the results in the Wolff decision (arising in a neighboring lake state with similar relevant state laws), clearly evidence that Appellant maintains a good faith assertion of ownership. Those factors, together with BLM's disclaimer of interest in similar omitted islands in Michigan, and the Koch decision, convince us that Appellant's claim is sufficiently meritorious as to be appropriate for exercise of the Secretary's discretionary authority under the Minnesota Act.

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 reversed and remanded to BLM for actions consistent with this decision.

H. Barry Holt
Chief Administrative Judge

I concur:

Will A. Irwin
Administrative Judge

^{15/} Appellant's evidence is credible as to his and his predecessors' good faith belief that the island was always considered and treated as part of Government Lot 3, notwithstanding the Dec. 6, 2000, letter from the Todd County Assessor to BLM that "I cannot find anywhere in our records, documentation indicating an island being [separately] taxed in [sec. 1, T. 131 N., R. 32 W.]."