

DUDLEY S. LONG ET AL.

IBLA 74-146

Decided June 18, 1974

Appeal from decision of Oregon State Office, Bureau of Land Management, rejecting preference right claim in public auction sale OR 8006.

Affirmed.

Act of September 26, 1968 – Regulations: Interpretation

The Act of September 26, 1968, 43 U.S.C. §§ 1431-35 (1970), which authorized for a limited time the sale of tracts of public land which were or had been subjected to unintentional trespass, was implemented and interpreted not only by 43 CFR Subpart 2785 (1971), but also the general public sale regulations, 43 CFR Part 2710 (1973).

Agency–Public Sales: Generally–Public Sales: Preference Rights

Where a preference right for a public sale pursuant to the Act of September 26, 1968 43 CFR U.S.C. §§ 1431-35 (1970), is asserted by one who, upon submission of proof of ownership of contiguous lands, is revealed to have bid at the sale and asserted the preference right with the permission of the owners of the whole title in fee simple of such contiguous lands, such showing is inadequate to establish a valid preference right in the applicant.

APPEARANCES: James C. Lynch, Esq., Conn & Lynch, Lakeview, Oregon, for appellants.

## OPINION BY ADMINISTRATIVE JUDGE FISHMAN

Dudley S. Long, Veva Long, the Emery Livestock Company, Gordon Emery and Verle Emery have appealed from a decision of the Oregon State Office, Bureau of Land Management, dated November 13, 1973. That decision rejected a preference right claim to an isolated tract of land, consisting of 39.56 acres approximately, offered at public auction OR 8006 on September 18, 1973.

On May 12, 1971, Gordon Emery and Verle Emery, "Emery Brothers," as purchasers under a sale contract of certain adjacent lands, filed an application for sale of the tract under the Act of September 26, 1968, 43 U.S.C. §§ 1431-35 (1970). The sale contract embraces the adjacent lands which completely surround the tract in issue. Sale of the tract was sought under the Act of September 26, 1968, supra, which authorized the auctioning off of tracts of public land which were or had been subject to unintentional trespass. This Act was only effective for sales in which application was made within three years from its effective date. The application in the present case was filed within the period.

The regulations governing the sale of such tracts were published on June 13, 1970, at 35 F.R. 9633, and were included in 43 CFR Subpart 2785 (1971). They were deleted from the Code of Federal Regulations on November 12, 1971, by a notice published at 36 F.R. 21677. However, it was stated there that these regulations would continue to be applied to sales under the 1968 Act which were initiated prior to September 26, 1971.

The Act authorized a public auction to be held upon the Secretary's finding that the tracts sought were "not needed for public purposes." Such tracts were to be sold to the highest bidder, except where a preference right was asserted by "any owner of contiguous lands," 43 U.S.C. § 1432 (1970), during the 30 days following the receipt of the high bid.

A public auction sale was held on September 18, 1973. At this sale, one Marjorie Shollenberger submitted the high bid. Immediately after the auction sale was completed, and on the same day, Emery Livestock Company and Verle Emery asserted a preference right and tendered the amount of the high bid.

43 CFR Subpart 2785 (1971), referred to above, specifies that the procedures set forth in 43 CFR Subpart 2710 apply, " \* \* \* except that the owner of contiguous lands who wishes to assert his preference right must offer to purchase the lands at the highest bid received." 43 CFR 2785.1 (1971).

In this case, as already noted, Emery Livestock Company and Verle Emery asserted a preference right immediately after the announcement of the high bid, and tendered an equivalent amount. On October 26, 1973, Emery Livestock Company, by Gordon Emery, President, and Verle Emery, directed the Oregon State Office, in a letter, to transfer the deposited tender to Dudley S. Long and Veva Long, who are also appellants in this case. This letter stated the " \* \* \* [i]t was the purpose and intent to make the bid in their [the Longs's] names so they would have the property \* \* \*." There was also included a certificate of ownership, certified by a title company, showing that on October 18, 1973, the Longs were the sole owners in fee simple of the lands contiguous to the tract in issue. <sup>1/</sup>

In essence, the Oregon State Office ruled in the decision below that because the owners of fee title to the surrounding private lands, the Longs, did not personally offer to purchase the tract within 30 days of the auction, the preference right provided by 43 CFR 2711.4(b)(2) was lost. The decision below pointed out that though the Emery Livestock Company and the Emerys directed the transfer of the deposit from their account to that of the Longs, the statement indicating an agency relationship existed between them had not been corroborated by the Longs at that time.

In their challenge to this decision, appellants state that they together own the fee simple title to the surrounding lands. The Longs submitted an affidavit which in pertinent part reads as follows:

I, Dudley Long, and I, Veva Long, depose \* \* \* that we did, as sellers, sell to Verle Emery and Gordon Emery, under contract dated October 31, 1967, did agree to sell and the said Emerys did agree to purchase as follows:

---

<sup>1/</sup> Prior to the submission of these documents, the Oregon State Office, apparently received a certificate of ownership in which the Emery Livestock Company was indicated as a contract purchaser of the adjacent lands and the Longs certified to be the sole owners in fee simple of these lands. As discussed *infra*, the original application for public sale showed Gordon Emery and Verle Emery d/b/a Emery Brothers, to be contract purchasers from appellants Long.

\*\*\* [Description of lands contiguous to the tract in issue]

That prior to bidding upon the real property offered under Public Sale OR 8006, which abutes [sic] upon the lands above described, the said Emerys consulted with us, advised us that they had transferred their contract to a corporation and it was with our approval that they did enter a bid upon the Public Sale OR 8006 believing that they should be the bidders and they, the contract purchasers.

That thereafter, we were advised by the Bureau of Land Management that the record owners of title should sign the application and we did thereafter and after October 18, 1973, furnish and execute the form No. 2710 and included it with a letter from the Emerys directing the transfer of the \$2,000 to said purchase price.

That we do hereby ratify and confirm each and every act shown in the record of the Bureau of Land Management performed by Gordon Emery and Verle Emery, the Emery Livestock Company and by ourselves and point out to the Bureau that Gordon Emery, Verle Emery, Emery Livestock Company, Dudley Long and Veva Long, his wife, do own jointly <sup>2/</sup> the fee simple title to the abutting lands described.

We make this affidavit for the purpose of establishing with the Bureau of Land Management the ratification and confirmation and the oral power of attorney granted by us to the said Emerys to the act as hereto set forth.

In essence, appellants seek to establish what amounts to an agency on the part of the purchasers under a land sale contract covering the private property surrounding the public tract at issue, on behalf of the record title holders of such property. The Department has held that a principal may ratify and adopt the acts of one who has acted on the assumption that he is an agent. Such ratification \*\*\* related back and is equivalent

---

<sup>2/</sup> See Richard M. Hatch, 67 I.D. 187 (1960).

to a prior authority." Missouri Pac. R.R. Co. v. Choctaw, Okla & G. R.R. Co. (on reconsideration), 52 L.D. 730, 731 (1929).

However, such "after the fact" ratification will be ignored where substantial confusion results, and the Department is free to construe actions so as to avoid prejudice to either the Government or third parties. William G. Taylor, 60 I.D. 227 (1948). Here there has been no prejudice to the Government because the tract had been classified for disposal. However, the high bidder's rights would be prejudiced. Cf. McKay v. Wahlenmeier, 226 F.2d 35 (D.C. 1955).

We must look to see whether the affidavit establishes an agency.

In Earl C. Hartley, 65 I.D. 12 (1958), it was stated that:

To create an agency it is fundamental that there must be consent on the part of both principal and agent that an agency shall exist. The principal must intend that the agent shall act for him and the agent must intend to accept the authorization and act on it. 2 Am. Jr., sec. 21; Rest., Agency, sec. 15. There need be no express agreement between the principal and agent, but if there is none, there must be facts from which consent is to be implied. Mack v. American Security & Trust Co., 191F.2d 775 (C.A.D.C., 1951). The courts have frequently stated that the burden of proving the existence of agency is upon the party asserting it (Gosney v. Metropolitan Life Ins. Co., 114 F.2d 649, 653 (8th Cir. 1940); Mack v. American Security & Trust Co., *supra*), and that agency will not be presumed or inferred because the conditions and circumstances are such as to make such an agency seem natural and probable and to the advantage of the supposed principal (In re Thomas, 199 Fed. 214 (D.C.N.Y. 1912)). The mere fact that one transacts business for another does not necessarily give rise to the relationship of principal and agent. McKay v. Brink, 272 N.W. 72 (S. Dak. 1937).

Id. at 19.

Moreover, as was said in Hartley at 18: "In the present case,

there is not an iota of evidence that Anderson had ever acted as the company's agent in any of its dealings with the Bureau."

Returning to the affidavit offered on appeal, that document, in our judgment, does not establish an agency. The language that "it was with our approval that they did enter a bid upon the Public Sale Or 8006 believing that they should be the bidders and they, the contract purchasers," is consistent with an ineffectual effort to transfer the preference right as though it were a chose in action. Nowhere is it established that the Longs intended to purchase the public land in issue or that the Emery assertion of preference right was in furtherance of the Longs' desired acquisition of such public land. These are essential elements of agency which are missing from the case.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

---

Frederick Fishman  
Administrative Judge

We concur:

---

Douglas E. Henriques  
Administrative Judge

---

Edward W. Stuebing  
Administrative Judge

