

Editor's note: Reconsideration denied by order dated Aug. 18, 1975

BEN J. BOSCHETTO

IBLA 75-427

Decided July 28, 1975

Appeal from the decision of the Wyoming State Office, Bureau of Land Management, rejecting color of title application W-49643.

Affirmed.

1. Color or Claim of Title: Generally -- Withdrawals and Reservations:
Effect of

The Color of Title Act, 43 U.S.C. § 1068 (1970), applies only to public land, i.e., vacant, unappropriated, unreserved Federal real property subject to the public land laws. An application under the Act which is based upon color of title initiated when the subject land was withdrawn from the operation of the public land laws and reserved as national forest land must be rejected.

2. Words and Phrases: Public Land

The term "public land" can only be defined in context, and is not a term of art having specific legal effect. Usually, however, it means the general public domain, unappropriated land; land belonging to the United States and which is subject to sale or other disposal under the general laws, and not reserved or held back for any special governmental or public purpose.

APPEARANCES: Jon P. Harward, Esq., Campbell, California, for the appellant.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

Ben J. Boschetto filed an application pursuant to the Color of Title Act, 43 U.S.C. §§ 1068, 1068a (1970), to purchase a tract of land comprising 2.58 acres in the N 1/2 NW 1/4 of sec. 29, T. 38 N., R. 113 W., 6th P.M., Wyoming. The application stated that the claim, or color of title, was initiated by a deed of conveyance executed on April 3, 1947.

The Wyoming State Office of the Bureau of Land Management rejected the application for the reason that the subject land had been withdrawn from the operation of the public land laws and reserved for what was then the Teton Forest Reserve by Proclamation No. 19 of President Theodore Roosevelt on May 22, 1902. The land has remained in national forest status ever since. The Bureau's decision was premised on the following proviso in the governing regulation, 43 CFR 2540.0-5(b):

* * * A claim of class 1 is one which has been held in good faith and in peaceful adverse possession by a claimant, his ancestors or grantors, under a claim or color of title for more than 20 years, on which valuable improvements have been placed, or on which some part of the land has been reduced to cultivation. * * * A claim is not held in peaceful, adverse possession where it was initiated while the land was withdrawn or reserved for Federal purposes.

(Emphasis added.)

Appellant asserts that the decision is in error for the reason that the underscored portion of the quotation from the regulation is not covered by the statute. Appellant further maintains that the statute is applicable to all public lands, and that, "lands reserved for Forest Service use do not by that fact become 'non public'."

[1] In seeking to apply the term "public land" as a term of art with specific legal effect, appellant is plowing old ground. This Board recently addressed itself to an examination of that precise issue in another color of title case, James E. Smith, 13 IBLA 306, 80 I.D. 702 (1973). There we held that a color of title application cannot be allowed where the applicant fails to show that the land applied for is "public land," i.e., land subject to the operation of the public land laws, and we held that the term "public land" does not include land which has been set aside by Executive Order for the benefit of the Indians. That decision also quoted from Donald E. Miller, 2 IBLA 309, 312 (1971), as follows:

The words 'public lands' are not always used in the same sense. Their true meaning and effect are to be determined by the context in which they are used. Although it is true that often those words mean such land as is subject to sale or disposition under the general public land laws, and not such as is reserved for any purpose, the term has been applied to reserved lands title to which was in the United States and to which no other party had acquired a vested right. * * * (Footnotes omitted.)

In another recent color of title case, which involved land in a national forest, John C. Brinton, 13 IBLA 69 (1973), the following was listed in an enumeration of necessary qualifications:

* * * Second, for a class 1 color of title claim he would have to show that the land was held under color of title for 20 years with permanent improvements or cultivation before any withdrawal of the land which would take it out of the category of land subject to the Color of Title Act. Margaret H. Erling, A-30437 (December 16, 1965). Thus, if the land was conveyed to the United States to be part of a national forest and upon receipt of the deed the lands by operation of law became a part of the forest, a color of title claim would have to be initiated before the land became a part of the forest. Cf. Asa V. Perkes, 9 IBLA 363 (1973); see Nina R. B. Levinson, 1 IBLA 252, 78 I.D. 30 (1971). See also Margaret C. More, 5 IBLA 252 (1972); Lester J. Hamel, 74 I.D. 125 (1967); Solicitor's Opinion of October 4, 1965, M-36684, 72 I.D. 409 (1965). This would require a showing of a chain of title initiated prior to the issuance of the quitclaim deed to the United States. 1/

In Asa V. Perkes, 9 IBLA 363 (1973), we stated:

Clearly, a color of title claim could not be initiated upon withdrawn or reserved lands. 43 CFR 2540.0-5(b); Margaret C. More, 5 IBLA 252 (1972);

1/ See 43 CFR 2450.0-5(b) for the requirements for a class 2 color of title claim. Both classes of claims cannot be held in "peaceful adverse possession" within the meaning of the Color of Title Act if initiated while the land was withdrawn or reserved for federal purposes.

Palo Verde Color of Title Claims, 72 I.D. 409 (1965); Claude M. Williams, Jr., et al., A-29928 (March 26, 1964). However, if a color of title claim arose before a withdrawal of the lands, the withdrawal would not preclude perfection of the claims under the Color of Title Act. Clement Vincent Tillion, Jr., A-29277 (April 12, 1963).

In this context it is noteworthy that the Wyoming State Office, at the request of the applicant and his attorney, delayed the rejection of the application in order to afford them the opportunity to research the ownership records in an effort to establish a continuous chain of title which would proceed the withdrawal of the land for national forest purposes, and the Wyoming State Office did not reject the application until it was notified that they had been unable to trace the ownership of the claim to that early a date.

Since 1965 Departmental decisions on this point have been guided by Beaver v. United States, 350 F.2d 4, 10 (9th Cir. 1965), holding:

[10] No cases are cited to support appellants' position. Moreover, the government supports its position not only on a failure to prove the necessary adverse possession, but on the further fact that (a) this was not land subject to public entry, for it was land accreted to withdrawn land; and (b) withdrawn land is not subject to the Color of Title Act because it is already appropriated for other purposes. Federal Power Comm'n v. State of Oregon, 349 U.S. 435, 446-448, 75 S.Ct. 832, 99 L.Ed. 1215 (1955); Anderson v. United States, 218 F.2d 780, 15 Alaska 377 (9th Cir. 1955); Jones v. United States, 195 F.2d 707, 709, 13 Alaska 629 (9th Cir. 1952); United States v. Hanson, 167 F. 881, 886 (9th Cir. 1909).

(Emphasis added.)

An extensive examination and application of the rule was made in Margaret C. More, 5 IBLA 252 (1972), wherein we said:

Our conclusion, then, turns on the issue of whether one may assert a valid claim under class 1 of the Color of Title Act, and thereby be entitled as a matter of law to a patent, where the land applied for is withdrawn from entry or disposition under the public land laws.

Lands which come within the term "reservations" are distinguished from "public lands." "Public lands" are lands subject to private appropriation and disposal under public land law. "Reservations" are not so subject. Statutes providing generally for disposal of the public domain are inapplicable to lands which are not unqualifiedly subject to sale and disposition because they have been appropriated to some other purpose. Federal Power Comm'n. v. State of Oregon, 349 U.S. 435, 443, 444, 448 (1955); see Donald E. Miller, 2 IBLA 309 (May 26, 1971).

This land was not subject to public entry, for it was land accreted to withdrawn land, and withdrawn land is not subject to the Color of Title Act because it is already appropriated for other purposes. Beaver, et al. v. United States, *supra*, at page 10.

The Color of Title statute recognizes only a claim to a tract of "public land." The term "public land" as used in the statute does not include withdrawn land. The Department has repeatedly held that a [class 1] Color of Title claim cannot be initiated on withdrawn land. Lester J. Hamel, 74 I.D. 125, 128 (1967); Claude M. Williams, Jr. et al., A-29928 (March 26, 1964); see also Packwood Lumber Company, A-28080 (November 16, 1959); Paul L. Van Cleve, Jr., et al., A-28442 (January 12, 1961); Lewis J. H. Bockholt, et al., A-27906 (May 4, 1959); Edward T. Harris, Sr., A-27785 (January 19, 1959); Ralph Findlay, A-23522 (February 23, 1943).

Part of the problem in attempting to give definition and effect to the term "public lands" may be attributable to the fact that it has been employed in different ways by the courts and by this Department depending upon the particular statute under consideration and the circumstances of the case. Everett E. Wilder, 15 IBLA 366 (1974). For example, where unpatented land is withdrawn for incorporation in a national forest it is referred to as "public land" for the purposes of the Mineral Leasing Act of 1920 and the General Mining Law to distinguish such land from "acquired land." See e.g., Duncan Miller, 6 IBLA 216, 79 I.D. 416 (1972). This is necessary because the laws pertaining to mining and mineral leasing generally operate on withdrawn national forest land and unwithdrawn public domain with equal force, but do not apply to acquired land, which is subject to a different set of statutes for these purposes. However, as we have seen, a host of decisions and

opinions have concluded that where other public land laws are concerned, withdrawn land is not "public land" subject to the operation of these laws simply because the whole point of the withdrawal is to remove the land from the ambit of such laws and reserve them for the use of the United States.

[2] The term "public land," therefore, can only be defined in context, and is not a term of art having specific legal effect. Usually, however, it means the general public domain; unappropriated land; land belonging to the United States and which is subject to sale or other disposal under the general laws, and not reserved or held back for any special governmental or public purpose. Black's Law Dictionary, (4th ed.); Newholl v. Sanger, 92 U.S. 761, 763 (1875).

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.

Edward W. Stuebing
Administrative Judge

We concur:

Anne Poindexter Lewis
Administrative Judge

Frederick Fishman
Administrative Judge

