

PAUL H. AND FAY L. SLEEPER

IBLA 75-519

Decided November 10, 1975

Appeal from decision of the Eastern States Office, Bureau of Land Management, rejecting class 1 color of title application ES-14485.

Affirmed.

1. Color or Claim of Title: Generally

The Department of the Interior cannot grant a color of title application for land that was patented and is no longer public land; nor can a color of title application be granted where the title or claim is not derived from a source other than the Government.

2. Color or Claim of Title: Generally -- Surveys of Public Lands:
Dependent Resurveys -- Swamplands

A class 1 color of title application for lands classified upon dependent resurvey as omitted swamp and overflowed lands must be rejected when the applicants' 20-year period of peaceful adverse possession under color of title had not been established at the date title vested in the State under the provisions of the Swamp Lands Act, 43 U.S.C. §§ 981-986 (1970).

3. Color or Claim of Title: Applications -- Rules of Practice: Appeals:
Effect of -- Surveys of Public Lands: Dependent Resurveys --
Swamplands

An appeal from a decision rejecting a color of title application will stay the running of the 60-day period, provided by the decision appealed from, for filing affidavits and evidence in support of arguments that the dependent resurvey of the land applied for erroneously classified the land as swamp and overflowed in character.

APPEARANCES: Paul H. and Fay L. Sleeper, pro sese.

OPINION BY ADMINISTRATIVE JUDGE FISHMAN

Paul H. and Fay L. Sleeper have appealed from the decision of the Eastern States Office, Bureau of Land Management (BLM), which rejected their class 1 color of title application for lands described by metes and bounds in secs. 26 and 27, T. 1 S., R. 4 W., Michigan Meridian, Michigan. Appellants' application indicated cultivation of 15 of the 120 acres involved for the last 40 years, and contained a chain of title derived from "Stephen Blodget and wife" who received a patent from the United States on May 1, 1839.

Appellants also indicated in their application that they first learned they did not have clear title to the land in July 1971 from the BLM. On August 28, 1972, the Chief, Division of Cadastral Survey, BLM, accepted for filing the plat of the dependent resurvey of portions of secs. 26 and 27, T. 1 S., R. 4 W., Mich. Mer., which were lands omitted from the original 1825 survey. The omission was determined to constitute gross error.

The BLM decision rejected the application for the portion of the upland in the SE 1/4 sec. 27 defined by the meander line of the original survey because the land was not public land, and thus not subject to the Color of Title Act, 43 U.S.C. § 1068 (1970). 43 CFR 2540.0-3(a). That land was patented in 1839 to Stephen Blodget. The BLM rejected the application for the remaining land because it had determined that these lands were erroneously omitted from the original survey, and that they were swamp and overflowed in character and therefore passed to the State of Michigan as of September 28, 1850, pursuant to the Swamp Lands Act, as amended, 43 U.S.C. §§ 981-986 (1970). Thus the newly-surveyed lands applied for were held not to be public land subject to the Color of Title Act.

In their appeal the Sleepers reiterate that they have paid taxes on the land since 1954, and that the land, or some portion of it, has been cultivated since 1934. The appeal also contains a general allegation of error.

[1] We affirm the BLM's holding that the upland portion of the SE 1/4 sec. 27 defined by the original survey meander line is not public land and is thus not subject to color of title application. E.g., Day v. Hickel, 481 F.2d 473, 475 (9th Cir. 1973); William P. Surman, 18 IBLA 141 (1974); James E. Smith, 13 IBLA 306, 309-10, 80 I.D. 702, 704 (1973). Moreover, as the land was patented by the United States to Stephen Blodget, appellants' original predecessor in interest, it appears that this land is not public land subject to the Act because appellants themselves own it. In any event, a color of title application is cognizable only where the title or claim is derived from some source other than the Government. Minnie E. Wharton, 4 IBLA 287, 79 I.D. 6 (1972), rev'd on other grounds, United States v. Wharton, 514 F.2d 406 (9th Cir. 1975).

[2] The Notice of Filing of Plat of Survey for the dependent resurvey of the omitted lands recited that the remaining parcels in the application at issue were over 50 percent swamp and overflowed within the meaning of the Swamp Lands Act, as amended, 43 U.S.C. §§ 981-986 (1970). So long as this finding is correct, 1/ it binds both the United States and the State of Michigan, which chose to take under the Act in accordance with the classification of the land in the survey field notes and plat. 43 CFR 2625.0-3(a). The grant of swamp lands to the states was a grant in praesenti as of September 28, 1850, the date of the Act, and upon subsequent identification of lands subject to the Swamp Lands Act, the State's title relates back to September 28, 1850. United States v. Minnesota, 270 U.S. 191, 204-06 (1926); O'Donnell v. United States, 91 F.2d 14, 26-30 (9th Cir. 1937).

A class 1 color of title claimant acquires a right of purchase from the United States of the land he holds "in peaceful, adverse possession * * * for more than twenty years." 43 CFR 2540.0-5(b). Day v. Hickel, supra at 476, discussing the Act of July 28, 1953, 67 Stat. 227, which amended the Color of Title Act, and its legislative history (1953 U.S. CODE CONG. & ADM. NEWS 2014). Thus, assuming

1/ Appellants have submitted material in support of their color of title application that, in effect, argues error in the resurvey's classification of the land as swamp and overflowed. They assert that the "Survey of August 28, 1972, is not complete as it was made after lands were dredged in 1970 and 1971 by 28 Mile Investment Company." See text accompanying note 4 infra.

appellants have color of title to the land in conveyances which date from 1839, 2/ their claim was not 20 years old when the right of the State of Michigan vested on September 28, 1850. Appellants' 20-year period may have run against the United States, but not prior to the vesting of an adverse right to the land against the United States. 3/ See State of Louisiana v. State Exploration Co., 73 I.D. 148 (1966).

The BLM decision thus correctly decided that the land defined by the original meander line is not public land subject to color of title application as long as the determination that the land was swamp and overflowed in character, and thereby passed to the State of Michigan, is correct.

[3] Appellants point to the fact that a portion of the land classified as swamp and overflowed has been cultivated, and more of it is tillable. 4/ This fact, in conjunction with their assertion that some of the newly-surveyed land was recently dredged, and other material in the record, might be the basis for a protest against the BLM's land classification, but it does not establish a cognizable color of title claim.

2/ If BLM correctly determined that there were lands omitted from the 1825 survey, no deed or conveyance describing the land in accordance with the subdivisions of the 1825 survey conveyed any of the omitted land. A deed subsequent to the Government's patent to Stephen Blodget, purporting to convey land omitted by the 1825 survey, would be necessary to start appellants' chain of colorable title. Of course, if the land was not omitted, title would have passed to the owners of the adjoining surveyed land as the riparian owners of the bed of a non-navigable body of water. See 93 C.J.S. Waters § 107 (1956). The chain of title submitted by the applicants does not show the land descriptions in the conveyances in the chain.

3/ As appellants' predecessors could not have established the requisite 20 years of adverse possession prior to the swamp land grant to the State of Michigan, it is unnecessary to consider the further issue of whether rights under the Color of Title Act, passed in 1928, could possibly prevail over rights established by the Swamp Lands Act, passed in 1850. See Morrow v. State of Oregon, 32 L.D. 54, 64-65 (1903).

4/ The swamp land grant applies only to lands which were, on September 28, 1850, by their swamp and overflowed character "made unfit thereby for cultivation." 43 U.S.C. § 982 (1970).

The BLM in its decision notified appellants that they could pursue their application under 43 CFR 2625.2 5/ by submitting a showing that the lands are not subject to the swamp land grant to the State of Michigan. Appellants have submitted material that tends to support such an assertion. While we affirm the BLM decision rejecting appellants' application for the newly-surveyed lands on the current record, we regard the appeal to this Board as having suspended the running of the 60-day period set by the BLM decision for submission of affidavits and supporting evidence under 43 CFR 2625.2. Therefore, appellants will have 60 days from receipt of this decision to submit to the Eastern States Office, BLM, any material in support of their contention that the land is not subject to the swamp land grant, in the manner provided in 43 CFR 2625.2, failing in which the rejection of appellants' color of title application will become final.

5/ The regulation provides, in relevant part:

"§ 2625.2 Applications in conflict with swamp-land claims.

"Applications adverse to the State, in conflict with swamp-land claims, will be governed by the following rules:

"(a) In those States where the adjudication of swamp-land claims is based on the evidence contained in the survey returns, applications adverse to the State for lands returned as swamp will be rejected unless accompanied by a showing that the land is non-swamp in character.

"(b) In such case, the claim adverse to the State must be supported by a statement of the applicant under oath, corroborated by two witnesses, setting forth the basis of the claim and that at the date of the swamp-land grant the land was not swamp and overflowed and not rendered thereby unfit for cultivation. In the absence of such affidavit the application will be rejected. If properly supported, the application will be received and suspended subject to a hearing to determine the swamp or non-swamp character of the land, the burden of proof being upon the non-swamp claimant.

* * * * *

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 and the case remanded.

Frederick Fishman
Administrative Judge

I concur:

Joseph W. Goss
Administrative Judge

I concur in the result:

Joan B. Thompson
Administrative Judge

