

**Editor's note: 83 I.D. 1; Appealed -- dismissed, sub nom. Lloyd Hayes v. S. Pac. Transportation Co., Civ. No. 79-954 (E.D.Cal. May 1980)**

SOUTHERN PACIFIC TRANSPORTATION CO.

JAY R. FOGAL

LLOYD D. HAYES, INTERVENOR

IBLA 75-429

Decided January 9, 1976

Appeal from the rejection of an application for patent to public land pursuant to the Transportation Act of 1940.

Reversed and remanded.

1. Railroad Grant Lands

Legal title, although not record title, to granted lands passes to a railroad under a railroad land grant act upon the filing of a map of definite location of the railroad and such title is subject to divestiture by adverse possession under state laws prior to the issuance of patent to the granted lands.

2. Railroad Grant Lands

Where land within the primary limits of a railroad land grant is excluded or reserved by the terms of the granting act, the adverse possession of one who asserts only that he has satisfied the statute of limitations of a particular State will not divest the United States of its title or invest the adverse possessor with any interest in the land.

3. Railroad Grant Lands

Where land within the primary limits of a railroad land grant is not excluded or reserved by the terms of the granting act, the statute operates to vest title in the railroad at the time the railroad qualifies to receive it. It is a grant in praesenti, regardless of whether the United States has issued its patent or certificate.

4. Mineral Lands: Generally--Railroad Grant Lands

Lands known to be mineral in character (except for coal or iron) at the time of definite location of a railroad are excluded from the grant of place lands to the railroad even though the lands may later lose their mineral character.

5. Mineral Lands: Determination of Character of--Railroad Grant Lands

The period for determination by the Department of the Interior whether public land included within the primary limits of a legislative grant-in-aid of the construction of a railroad which excepts mineral land is mineral in character extends to the time of issuance of patent to the railroad company.

6. Act of September 18, 1940 (Transportation Act of 1940, 49 U.S.C. § 65(b) (1970))--Conveyances: Generally--Railroad Grant Lands--Words and Phrases

Where the purchaser from the railroad of unpatented land believed at the time of his purchase that the land was mineral, and there was physical evidence of its mineral character, or if conditions were such that the purchaser should have known then that the land was excepted from the grant to the railroad, he was not a purchaser in good faith within the "innocent purchaser" proviso of section 321(b) of the Transportation Act of 1940.

7. Mineral Lands: Determination of Character of--Railroad Grant Lands--Rules of Practice: Hearings

When the Department of the Interior finds that public land within the place limits of a legislative grant-in-aid of the construction of a railroad was mineral in character and the railroad company challenges such finding, a hearing should be granted at which the Department has the obligation of making a prima facie case of mineral character, whereupon the company

has the burden of establishing nonmineral character by a preponderance of the evidence.

8. Trespass: Generally

Where timber on Federal land is cut for commercial purposes by one who knows that no patent has issued and who occupies the land either as a mining claimant or as one who is engaged in attempting to defeat the interests of third parties by adverse possession, the taking of the timber constitutes a willful trespass against the interests of the United States. If the taking occurs after a State court has issued its decree quieting title in the timber-taker against all third parties but not against the United States, the taking will nonetheless constitute a trespass if it is determined that legal title had not passed from the United States by operation of law.

APPEARANCES: James M. Day, Jr., Esq., Sacramento, California, for the appellant; Donald H. Coulter, Esq., Grants Pass, Oregon, for the intervenor.

## OPINION BY ADMINISTRATIVE JUDGE STUEBING

The Southern Pacific Transportation Company, successor to the Central Pacific Railroad Company of California, applied by its Selection List No. 35 for a patent to 140 acres of land in the NE 1/4 of section 15, T. 12 N., R. 10 E., M.D.M., for the benefit of Jay R. Fogal. The application was filed pursuant to section 321(b) of the Transportation Act of September 18, 1940, 49 U.S.C. § 65(b) (1970).

The land at issue allegedly was subject to the operation of the Federal grant of lands made available to the Central Pacific by the Act of July 1, 1862 (12 Stat. 489, as amended, by the Act of July 2, 1864 (13 Stat. 356)). The Central Pacific quitclaimed this and other land on April 24, 1890, to Joseph R. Walker and Matthew H. Walker in consideration of their payment of § 725, thereby initiating a chain of title which, through mesne conveyances, ultimately terminated with Alpine Gold Mining Company, the last grantee of record.

In order to receive the advantageous freight rates afforded by the Transportation Act of 1940, the Act required the land grant railroads to release all unsatisfied claims to grant lands, except, inter alia, claims to lands previously sold by such railroads to

an innocent purchaser for value. Accordingly, when the railroad filed its release, it did not release its claim to the land here at issue.

Over a period of many years from 1902 to the 1930's numerous mining claims were located on the land by persons who were strangers to the chain of title created by the sale from Central Pacific to the Walkers. These claims eventually blanketed the subject land.

To compound the problem, there is yet another chain of title which originated in 1892 with a deed from one Pablo Cortez in favor of Robert Hunt. There is no legitimate basis shown for this chain of title, which is comprised of 10 conveyances, and apparently terminated with the last transfer of record in 1929.

In 1934 Jay R. Fogal, a stranger to both the chain of title from Central Pacific and the chain of title from Cortez, acquired the several unpatented mining claims which blanketed the land. In 1947 he applied for patent to these claims under the 1872 mining law. The claims were examined on several occasions by two mineral examiners of the Bureau of Land Management who each recommended that contest proceedings be initiated to test the validity of each of the claims. Contest proceedings were brought and, after a hearing, the Hearing Examiner held that all of the claims were

null and void because no qualifying discovery of a valuable mineral deposit had been made within the boundaries of any of the eight claims held by Fogal. Fogal appealed to the Director, Bureau of Land Management, who affirmed the Hearing Examiner's decision on June 16, 1959. A final appeal by Fogal to the Secretary resulted in another affirmation of the holding that the claims are null and void because of lack of discovery of a valuable mineral deposit within the boundaries of any of the claims sufficient to warrant a prudent man in the further expenditure of his labor and means, with a reasonable prospect of success in developing a valuable mine. United States v. Jay R. Fogal, A-28233 (May 10, 1960). Fogal did not seek judicial review of this decision, which constituted a final determination.

Apparently, however, Fogal remained in possession of the land, made certain improvements thereon, and sold commercial timber therefrom. In 1972 he brought suit in Superior Court of the State of California in and for the County of El Dorado, to quiet title to the property, claiming ownership through adverse possession in compliance with the California statute of limitations. The Court's judgment in that action held that Fogal was "the owner in fee simple and entitled to the possession of" the described land, and held further that the named defendants in that action, and those claiming title under them, "are without any right, title,

interest, claim or estate whatsoever \* \* \*." Nonetheless, the Court said, "This judgment does not foreclose any claim of the United States of America in and to said real property." Fogal v. Mont Eaton, et al., No. 20264 (Entered July 13, 1972). The judgment was dated July 7, 1972.

Armed with his quiet title decree, Fogal then approached Southern Pacific Transportation Company and prevailed upon it to file this application for patent on Fogal's behalf.

Meanwhile, Lloyd D. Hayes, Intervenor herein, had allegedly been negotiating with the Alpine Gold Mining Company, the last owner of record in the chain of title emanating from the Central Pacific Railroad Co.; and, according to Hayes, the Alpine Gold Mining Company conveyed the land to Hayes by quitclaim deed dated July 12, 1972. We note that Alpine Gold Mining Company was a party named in the quiet title action brought by Fogal, and that the judgment specifically held that Alpine Gold Mining Company held no interest in the land. We note further that the quitclaim from Alpine Gold Mining Company to Hayes was dated 5 days after the judgment was dated, and 1 day before the judgment was filed and entered. We have no means of knowing whether the land was then listed in the notices of lis pendens, nor have we analyzed the effect of these considerations on the respective positions

of the parties under California law. Accordingly, we make no adjudication of the protest and claim of Lloyd D. Hayes.

On February 24, 1975, the California State Office of the Bureau of Land Management held for rejection the application of Southern Pacific for the reason that Fogal was not in the chain of title emanating from the Central Pacific Railroad Company, there having been no conveyance from Alpine Gold Mining Company to Fogal. The decision further held that Fogal's title by adverse possession is a new title, not based upon the chain of title from the railroad, and that a title acquired by adverse possession does not qualify the holder as an innocent purchaser for value, as contemplated by the Transportation Act of 1940.

[1] Appellants argue that the decision is in error; that an adverse possessor can, in law, acquire the interest or estate of a railroad (or of its grantees) under a land grant in aid of construction, while the United States continues to hold legal title.

We are in partial agreement with the appellants. This Department has previously examined the status of an adverse possessor who had matured a limitation title to railroad grant lands by compliance with the adverse possession statutes of the State in which such lands are situated. In Lester J. Hamel, 74 I.D. 125, 129 (1967), it was noted that the Supreme Court has held in several

instances that title may be acquired by adverse possession to lands granted to railroads in aid of construction of their lines, citing Toltec Ranch Company v. Cook, 191 U.S. 532 (1903); Iowa Railroad Land Co. v. Blumer, 206 U.S. 482 (1907); Missouri Valley Land Co. v. Wiese, 208 U.S. 234 (1908).

While none of the cited Supreme Court cases involve circumstances which correspond in all aspects with the circumstances of this case, they are nonetheless persuasive that a title acquired by adverse possession of railroad grant lands, applicable state statute, would qualify the holder of such title just as effectively as though he had acquired it through a lawful conveyance. \* \* \* "Hence, the statute of limitations would run against the railroad [and the railroad's grantees] by one in adverse possession of the railroad's land." \* \* \* Lester J. Hamel, supra, at 130.

The decision appealed from notes that, "Title by adverse possession is a new title not based upon the chain of title from the railroad." Appellants rebut this objection effectively, we think, by the following quotation from Williams v. Sutton, 43 Cal. 65, 73 (1872):

[The new title thus acquired is] founded on and springs from the disseizen... The new title thus acquired by the disseizor must of necessity correspond with that [title] on which the disseizin operated, as he could not acquire by disseizin a greater estate than that held by the disseizee.

This illustrates that although the source of the title is "new," it is nevertheless the same title.

We might add that not only can the adverse possessor acquire no greater title than that held by the disseizee, he can acquire no different title. In Toltec Ranch Co. v. Cook, supra, at 538, the Supreme Court said:

Adverse possession, therefore, may be said to transfer the title as effectually as a conveyance from the owner; it may be considered as tantamount to a conveyance. And the Central Pacific Railroad Company had the title. Salt Co. v. Tarpey, 142 U.S. 241 [1891]. It would seem, therefore, an irresistible conclusion that it could have been transferred by any of the means which the law provided. \* \*

Thus, if the Central Pacific Railroad Co. of California and the others in the record chain of title emanating from the Central Pacific's conveyance were entitled to the land, then Fogal succeeded to their entitlement, and only to their entitlement.

[2] This raises a critical issue not addressed in the decision below, to wit: Was the Central Pacific Railroad Company (or its grantees) entitled to the land? If not, Fogal has no right, title, claim or interest whatever in the land. It has been firmly established that the United States may not be divested of its title to federal lands by one who asserts only that he has satisfied the

statute of limitations of a particular State. Mere occupancy of public lands and making improvements thereon give no vested right therein against the United States or any [subsequent] purchaser therefrom, Sparks v. Pierce, 115 U.S. 408, 413 (1885), and an occupant must show that he occupies the same under some proceeding or law that at least gives him the right of possession. Henshaw v. Ellmaker, 56 I.D. 241, 244 (1937); Keller v. Bullington, 11 L.D. 140 (1890). Moreover, as we have seen, the decree of the California Superior Court quieting title in Fogal expressly provided that it did not affect the interest of the United States, nor could it have done so, the United States not having been a party to the action.

[3] It has been held that legal title, 1/ although not record title, to granted lands passes to a railroad under a railroad land grant act upon the filing by the railroad of a map of definite location of its line, and that the statute operates as a grant in praesenti at the time the railroad qualifies to receive it, regardless of whether a patent or certificate is issued by the United States. Missouri Valley Land Co. v. Wiese, *supra*; Iowa Railroad Land Co. v. Blumer; Lester J. Hamel, *supra*.

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1/ Ordinarily, we would consider that such a grant conveyed the equitable title, while the United States retained the bare legal or "record" title. However, both the United States Supreme Court and this Department have held that it was "the legal title as distinguished from an equitable or inchoate interest" which passed to the railroads. Deseret Salt Co. v. Tarpey, 142 U.S. 241 (1891); Lester J. Hamel, 74 I.D. 125 (1967).

Accordingly, if the Central Pacific Railroad qualified to receive this tract, the legal title vested in the railroad and eventually lodged with Fogal, where it presently resides, and the United States' only interest is to fulfill its ministerial obligation to issue the patent. Wisconsin Central Railroad Co. v. Price County, 133 U.S. 496 (1890); Deseret Salt Co. v. Tarpey, 142 U.S. 241 (1891); Toltec Ranch Co. v. Cook, *supra*.

However, the granting act and the amendment thereto specifically except inter alia "mineral land" 2/ (other than coal and iron land) or "any lands returned or denominated as mineral lands" from the terms of the grant, and therein lies the core of our concern with this case.

The record before us is replete with references to the history and occupation of this tract as mineral land. The Supreme Court has often held that title did not pass by the railroad granting act to mineral lands which were reserved by the act. McLaughlin v. United States, 107 U.S. 526 (1882); Western Pacific R.R. Co. v.

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2/ Also excluded from the grant were pre-emption, homesteads, swamp lands, or other lawful claims, any Government reservation, or the improvements of any bona fide settler. Section 4 of the Act of July 2, 1864. If the official records of the land office show that the subject land was in any of these categories, this claim could be disallowed without a hearing.

United States, 108 U.S. 510 (1882); Barden v. Northern Pacific R.R. Co., 154 U.S. 288 (1894); United States v. Southern Pacific Co., 251 U.S. 1 (1919); State of Wyoming v. United States, 255 U.S. 489 (1921). (Other Supreme Court citations omitted).

In order to make a finding that title to the land specified by the granting acts did not pass to the grantee of the railroad company, it must appear that the lands were of known mineral character either at the date of definite location of the line or at the date of the original sale by the railroad, or at any time between, and that the purchasers should have known at the time of their purchase that the land was excepted from the grant to the railroad, and that they could obtain no title from the railroad. This is so even though the land later loses its mineral character. Southern Pacific Company, 71 I.D. 224 (1964); Southern Pacific Co., (Heirs of George H. Wedekind), 20 IBLA 365 (1975). As indicated above, the record before us contains much which suggests that this may have been the situation in this instance. A resume of some of this evidence follows.

The land is situated in El Dorado County, California, in the Georgetown Mining District in the foothills of the Sierra Nevada Mountains, in what is generally considered part of the Mother Lode Belt. Empire Creek flows through the property, which has a number of springs on it which feed the creek. The Mother

Lode formation, also known as the Sierra Gold Belt, is described as one of the most interesting and, so far, the most persistent in depth of all the gold bearing formations in the United States. There are, or have been, many producing gold mines in the area. The foregoing information is contained in reports of mineral examinations conducted in September 1949, October 1956 and April 1957. The reports further show considerable evidence of mining activity over a long term of time. Indeed, in the 1949 report the examiner states:

These claims are located near a split in the Mother Lode Belt and cover a portion of the Mariposa and associated formations. Parts of the claims were worked by ground sluicing and hydraulic methods in the early days of mining in California as is evidenced by old glory holes, cuts and other work. (Emphasis added).

We turn now to the decision of Hearing Examiner John A. Wood, dated April 28, 1958, rendered in United States v. Fogal, Contest No. 5078, the proceeding to determine the validity of the mining claims held by Fogal which blanketed the subject land. The decision is not a part of the record of this case, but we take official notice thereof pursuant to 43 CFR 4.24(4)(b). In this decision the Hearing Examiner recounts the evidence adduced at the hearing. The Government's expert, a mining engineer, testified to the large number and variety of mine workings he found. He said there "were a large number of rock exposures all over the claims which have

been caused by minor surface workings." In addition he described three separate areas where old evidence of ground sluicing operations was found, six adits, one winze at the end of a 75-foot adit, several small earth reservoirs and/or diversion ponds, dams and ditches, several pits, shafts, trenches and cuts, and glory holes, most of which appeared old, some of which were caved or filled, and some of which were covered by vegetation, including small trees. His samples indicated little or no gold.

Fogal testified that he had found and produced sufficient gold to warrant his desire and intention to develop mining operations, and that he had only discontinued such operations because of the high cost and difficulty in getting labor. He exhibited gold which he took from the land. Fogal insisted that the land is mineral in character and testified to the geology in support of that assertion, referring to Bulletin 108, California Bureau of Mines. Quoting from the decision, at page 11:

Mr. Fogal testified at length as to what the records show on the operation of various mines when gold was \$20 an ounce and labor was \$2 a day and covered mines in various states and locations in an effort to show what might be on these claims in question and could be recovered if a fair price of gold was established suitable to warrant capital in assisting him in the exploration and development of the property.

Fogal also submitted proposed findings of fact, which included the following:

Contestee purchased said claims from partners of dissolved Madrone Mining Company, who purchased claims from H. L. Herzinger July 12th 1929. And mined said claims until sold to contestee.

It is important to note that although the contest complaint charged both that the land was nonmineral in character and that no discovery of valuable mineral deposits had been made within the boundaries of the claims, the contest was decided solely on a finding that there was, at that time, no discovery and, accordingly, there was no adjudication of the issue of the mineral character of the land. Moreover, a finding or recommendation that the land was nonmineral in the 1950's would not be dispositive of the question of its mineral character in the 1880's, which is the focus of our concern now.

In reviewing the Hearing Examiner's decision on appeal, the Acting Director, Bureau of Land Management, noted that Fogal "offered testimony to the effect that the subject claims were previously successfully operated for the gold therein contained and that it is only because of the increase in price of labor and the depressed price of gold that they cannot now be successfully exploited."

We now refer to the two title reports in the record. Both were prepared by the Inter-County Title Company for Fogal and

Hayes, respectively, and were submitted in support of their separate claims. These reports show not only that there has been historical interest in this land by a number of gold mining companies, but they also reflect doubt on the bona fides of the original purchasers from the railroad.

It will be recalled that the Central Pacific conveyed this land in 1890 to Joseph R. Walker and M. H. Walker. There is no record of a subsequent conveyance by either of them. However, they apparently conveyed certain interests in this land to two gold mining companies which were both under the exclusive directorship of members of the Walker family (with the possible exception of E. O. Howard). These were the Utah and California Gold Mining Company (on whose board of directors Howard served with four Walkers), and the Union Consolidated Gold Mining Company.

The second conveyance of record (in 1929) was by the directors and trustees of these two Utah corporations, which by then were defunct, and by the heirs of Joseph R. Walker and M. H. Walker. They conveyed this land to E. O. Howard, an erstwhile director of the Utah and California Gold Mining Company. Less than 4 months later Howard, joined by his wife, conveyed to the Alpine Gold Mining Company, also a Utah corporation. The title report reveals that in 1936 the vice president of Alpine Gold Mining Company was one John H. Walker, and its secretary was J. R. Walker.

The reports also show that there were two Joseph R. Walkers. Both sometimes used the initials J. R. and they were, respectively, Joseph R. Walker, Sr. and Joseph R. Walker, Jr., and both apparently signed occasionally without using their generational designation. Consequently, it is impossible to say with certainty that the Joseph R. Walker who purchased the land was the same as the Joseph R. Walker who served as a director or an officer of the different gold mining companies which held this land. However, it is fairly apparent that the Walker family exercised significant control over three separate gold mining companies, to which it committed the land, so that from the time the land was purchased by the Walkers in 1890 until the time Fogal obtained his quiet title decree, a period of 82 years, the land was in the hands of the Walkers or one of the three gold mining companies controlled by that family. This suggests rather strongly that the Walkers acquired the land in the first place because they regarded it as mineral in character, and treated it as such thereafter.

Moreover, it seems that the Walkers were not alone in their apparent belief that this was mineral land with a valuable gold potential. Strangers to the Central Pacific-Walker title began locating mining claims on this land near the turn of the century. Some of these were acquired by the Madrone Mining Company, which eventually conveyed them to Fogal. Apparently other mining claims,

or interests therein, were not acquired by Fogal, and remained outstanding until the quiet title action eliminated the other claimants.

It appears, therefore, that virtually all interest in this property, from the Walkers' to Fogal's, and numerous others', has focused exclusively on the mineral character of the land, save only for Fogal's harvest of commercial timber, concerning which we will say more, infra.

[5] It is well established law that the determination of the date the mineral character of the land in the primary limits of a railroad land grant was known (to ascertain whether the land passed under the grant) can be made at any time prior to the issuance of a patent to the railroad. If it is found that the land was known to be mineral in character at the time of the railroad's conveyance, and the purchaser was chargeable with actual or constructive knowledge of that fact, the grant would fail as to that land. Southern Pacific Co. (Wedekind), Southern Pacific Company, supra; State of Wyoming v. United States, supra at 507; Anderson v. McKay, 211 F.2d 798, 807 (D.C. Cir. 1954), cert. denied, 348 U.S. 836 (1954), rehearing denied, 348 U.S. 890 (1954); Barden v. Northern Pacific R.R. Co., supra. In determining whether the land is mineral in character, it is not essential that there be an

actual discovery of mineral on the land. It is sufficient to show only that known conditions were such as reasonably to engender the belief that the land contained mineral of such quality and in such quantity as to render its extraction profitable and justify expenditures to that end. Such belief may be predicated upon geological conditions, discoveries of minerals in adjacent land and other observable external conditions upon which prudent and experienced men are shown to be accustomed to act. United States v. Tobiassen, 10 IBLA 379 (1973).

[6] Where the purchaser from the railroad believed at the time of purchase that the land was mineral and there was physical evidence of its mineral character, or if conditions were such that the purchaser should have known then that the land was excepted from the grant to the railroad company, he was not a purchaser in good faith within the "innocent purchaser" proviso of section 321(b) of the Transportation Act of 1940. United States v. Tobiassen, *supra*; Southern Pacific Company, *supra*; Southern Pacific Co. (Wedekind), *supra*, and cases therein cited.

[7] Where it is found that railroad grant lands did not pass because of their mineral character and the railroad disputes this finding, the procedure is for the Department to bring charges against the railroad, and to hold a hearing on the charges. At

any such hearing it is first the Department's obligation to present a prima facie case that the lands were mineral in character on the critical date, whereupon the burden shifts to the railroad to show by a preponderance of the evidence that the lands, or any part thereof, were not mineral in character. United States v. Tobiassen, supra; Southern Pacific Company, supra; Southern Pacific Co. (Wedekind), supra, and cases cited therein.

We note that when this application was filed, the California State Office, BLM, requested a report from the Geological Survey as to whether this land was mineral in character on or before April 24, 1890, the date of the railroad's conveyance to the Walkers. The Geological Survey replied that the land was without value for any of the minerals covered by the mineral leasing laws, but added:

Gold has been reported in the area. A field examination is recommended. Your attention is directed to: California Journal of Mines and Geology, v. 52, no. 4, p. 492, p. 10.

This advice was not acted upon by Bureau personnel. Instead, the decision from which this appeal is taken was issued on the erroneous premise that one who acquires title by adverse possession cannot qualify.

That decision must be vacated and the case remanded for a thorough investigation of the mineral status of the land on the critical date and/or the good faith of the purchasers from the railroad. 3/ Should this investigation reveal insufficient cause to believe that the land was excluded from the operation of the grant, a patent must issue. If, however, the investigation discloses sufficient evidence to indicate prima facie that the land was excluded from the grant and the railroad company disputes this finding, a hearing must be conducted upon proper charges and a decision rendered.

Finally, we note that in his "Affidavit of Use and Occupancy" appended to the application Fogal states, "Timber has been removed from said property for commercial purposes." The timber in question apparently is that which is described as follows in the 1957 report of investigation:

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3/ The dissenting opinion concerns itself with the fact that Fogal, being an adverse possessor, is not "an innocent purchaser for value within the meaning of the 1940 Act." We agree that he is not, but we consider it irrelevant. The very language of the Act imposes an administrative duty upon the Secretary of the Interior to find whether the land in question was "\* \* \* heretofore sold by any such carrier to an innocent purchaser for value \* \* \*." Thus, the determination of bona fides and the payment of value is focused by the statute upon the person(s) to whom the carrier sold, and not on subsequent claimants to the title who might have acquired their interest through inheritance, gift, "or any of the means which the law provided." See Toltec Ranch Co. v. Cook, supra. Accordingly, the statutory test must be applied to the Walkers, as the purchasers from the railroad, and not to Fogal.

The soil covering is heavy and supports and excellent stand of timber consisting of Ponderosa pine, cedar, Douglas fir and Sugar pine. Madrone trees, from which the claim group gets its name, grow to an exceptional size of 18 inches in diameter. A considerable number of Ponderosa pines were noted to 36 to 40 inches in diameter. Stumpage on these eight claims was estimated to be worth approximately \$30,000.00. (Emphasis in original).

We question Fogal's right to take this timber. He certainly had no right to remove it for commercial purposes as the holder of unpatented mining claims. Teller v. United States, 113 F. 273 (8th Cir. 1901). Nor could he have legally harvested it during his subsequent period of adverse possession since he was fully aware of the Federal interest, having just been through a Government contest proceeding concerning this same land. Moreover, his adverse possession did not, and could not, operate against the interests of the United States. Sparks v. Pierce, supra. Therefore, any commercial timber-cutting by Fogal between the years 1934, when he acquired the mining claims and 1972, when title was quieted in him by judicial decree was, a fortiori, a willful trespass. After having obtained his quiet title decrees, he might reasonably have supposed that he had a right to harvest the timber notwithstanding the Court's caveat that the decree did not reach the interests of the United States. This would be so because, if all else were regular, title would have passed out of the United States, which would hold only the record title. Lester J. Hamel, supra. Even so, if the land is found not to

have passed under the railroad land grant, Fogal would be liable for removal of the timber. However, it seems unlikely that the timber removal occurred during this period, as Fogal's affidavit concerning it was made only 3 months after the Court issued its decree. An investigation of the circumstances of the timber removal should be correlated with the investigation of the mineral character of the land. If the cutting of timber is likely to continue it may be necessary to seek a temporary injunction pending resolution of the title question. See United States v. Foresuth, 321 F. Supp. 761 (D. Colo. 1971).

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 the case is remanded to the California State Office, Bureau of Land Management, for further action consistent with this decision.

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Edward W. Stuebing  
Administrative Judge

I concur:

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Frederick Fishman  
Administrative Judge

ADMINISTRATIVE JUDGE THOMPSON DISSENTING:

I would affirm the decision of the Bureau of Land Management's California State Office. I see no basis for a hearing in this case because the application was filed on behalf of Jay R. Fogal who has no standing to claim that he is either the purchaser from the railroad company or in a chain of title in privity with the purchaser.

The majority decision in this case assumes, as absolute propositions, matters which are the very issues to be resolved. For example, the decision states positively that when the railroad company filed its release under section 321(b) of the Transportation Act of 1940, 49 U.S.C. § 65(b) (1970), it did not release its claim to the land here at issue. The effect of the railroad's release and the interpretation of the Transportation Act are the determinative and vital questions to be resolved here.

Unfortunately the majority's opinion rests primarily upon Supreme Court cases rendered long before the Transportation Act of 1940. Those decisions decided questions of title to land after patents had been issued and resolved disputes between private parties based upon the application of state law--not federal law.

Whether a patent should issue to the railroad company here for the benefit of Fogal, claiming title only as an adverse possessor of the company and its successors in interest, is a question of federal law--not state law--as it necessarily involves the effect of the Transportation Act and the release filed under it. Cf. United States v. Powell, 330 U.S. 238 (1947); Krug v. Santa Fe Pac. R. Co., 329 U.S. 591 (1947).

This case is a case of first impression. Although there have been some Departmental decisions which relate to some of the problems which arise in this case, none squarely faced the crucial issues here. Since we have before us for the first time an issue which decides an important effect of the Transportation Act, we should very carefully consider that Act in connection with the railroad grant statutes and the changes in the law and public policy since the date of that Act.

As is well known in the history of public lands, railroad companies were granted certain lands along their rights-of-way as a subsidy to help the development of the railway system throughout this country. Krug v. Santa Fe Pac. R. Co., *supra*. The Act of July 1, 1862, 12 Stat. 489, as amended by the Act of July 2, 1864, 13 Stat. 356, was one of the major railroad grant statutes. In return for the benefits granted by the United States, the federal government received rate concessions. Among other provisions to

help an ailing railroad industry, the Transportation Act of 1940 did away with certain favorable government rate privileges (49 U.S.C. § 65(a) (1970)), conditioned upon the railroad carrier filing

\* \* \* a release of any claim it may have against the United States to lands, interests in lands, compensation, or reimbursement on account of lands or interests in lands which have been granted, claimed to have been granted, or which it is claimed should have been granted to such carrier or any such predecessor in interest under any grant to such carrier or such predecessor in interest as aforesaid. \* \* \*

49 U.S.C. § 65(b) (1970).

However, section 321(b) of the Act further stated:

\* \* \* Nothing in this section shall be construed as requiring any such carrier to reconvey to the United States lands which have been heretofore patented or certified to it, or to prevent the issuance of patents confirming the title to such lands as the Secretary of the Interior shall find have been heretofore sold by any such carrier to an innocent purchaser for value or as preventing the issuance of patents to lands listed or selected by such carrier, which listing or selection has heretofore been fully and finally approved by the Secretary of the Interior to the extent that the issuance of such patents may be authorized by law. [Emphasis added.]

Id.

It is apparent in this case that the railroad company filed the release required by the Act. By the terms of the Act such release included interests in lands "which have been granted" to the railroad. We must, therefore, start with the first premise that lands which had been granted to the railroad company were released to the United States, instead of assuming they were not released. The provision of section 321(b) of the Act last quoted above operates as a limitation upon the effect of the releases filed by the railroad companies. First, it makes it clear that the railroad carriers were not required to reconvey to the United States lands which had been patented or certified to the company. The lands in question here have not been patented or certified. Next, it provides that the Act shall not prevent the issuance of patents confirming title to lands the Secretary finds has been heretofore sold "to an innocent purchaser for value." The next provision is inapplicable here, so we are confined to determining whether the conditions of the prior exception are satisfied.

When we analyze this exception it is obvious that the Transportation Act did not except all lands conveyed by a railroad company from the effect of its release. It made three requirements: (1) the land had to have been sold prior to the Act; (2) the purchaser had to be innocent, i.e., a good faith standard; and (3) there had to be value for the purchase. Even if title had passed to the carrier, but patent

had not issued and the list not approved or certified for patent, the release would still effectually prevent this Department from issuing a patent to the railroad company if those three requirements were not satisfied. For example, this Department has no authority to issue a patent if land had been gratuitously conveyed by the railroad without a transfer of value, or if the purchaser fails to meet the good faith standard suggested by the qualifier "innocent." Congress apparently believed that where value had been paid for the land in good faith, the delay by the purchaser and his successors in interest in obtaining a certificate or patent should not prevent the purchaser from getting complete title, assuming that title did pass to the railroad company under the grant.

The Supreme Court has strictly interpreted the effect of the releases and section 321(b) of the Transportation Act. As stated in Krug v. Santa Fe Pac. R. Co., supra at 597, in referring to the language in the Act regarding the releases:

\* \* \* This language in itself indicates a purpose of its draftsmen to utilize every term which could possibly be conceived to give the required release a scope so broad that it would put an end to future controversies administrative difficulties, and claims growing out of land grants. \* \* \*

Further, the Court stated:

\* \* \* we think Congress intended to bar any future claims by all accepting railroads which arose out of any or all of the land-grant acts, insofar as those claims arose from originally granted, indemnity or lieu lands. All the Acts here involved, the Acts of 1866, 1874, 1904 and 1940, relate to a continuous stream of interrelated transactions and controversies, all basically stemming from one thing--the land grants. We think Congress wrote finis to all these claims for all railroads which accepted the Act by executing releases.

Id. at 598.

In determining the effect of the Act and the release by the railroad, we should, likewise, strictly interpret the Act and not broaden the scope of the exceptions to the releases beyond what Congress clearly intended. Instead of writing "finis" to the claim of the railroad in circumstances existing in this case, the majority has opened the door which may make available patents for the benefit of a class of persons not mentioned by Congress, and not within the policy for making the exception. The exception in section 321(b) of the Transportation Act protecting innocent purchasers for value is essentially a provision for equitable relief. It is predicated on there being equities in an innocent purchaser for value to be protected and warranting a confirmation of title. It is also a recognition of problems that might arise between the railroad company and its purchasers if the release

were deemed to defeat their interests in the land, and the purchasers were to sue the railroad to recover the value paid to it. However, none of these considerations is involved here where the adverse possessor is claiming the railroad's title to the land, not by virtue of purchase but by virtue of an adverse holding of the land under a state statute of limitations.

Because the majority opinion rests so much on the "rights" of adverse possessors, let us consider them in relation to our situation. The majority tends to deprecate the conclusion in the BLM decision that the title of an adverse possessor is a new title not derived from the railroad. Nevertheless, the general majority rule throughout this country is that the title obtained by an adverse possessor under a state statute of limitations and quiet title action in state courts is a break in the chain of title and is a new title. 4 TIFFANY, REAL PROPERTY, § 1172, p. 892 (3d ed. 1975); 5 THOMPSON ON REAL PROPERTY, § 2541, p. 510 (1957 ed.). Appellant even admits that a title based on adverse possession establishes a new chain of title. His quotation from a California Supreme Court case has been adopted by the majority. However, a complete quotation is more enlightening. With reference to a right resting upon the statute of limitations, the California court in Williams v. Sutton, 43 Cal. 65 (1872), stated:

\* \* \* The rule itself is founded on the proposition that when the statute has fully run, and has become effectual to bar an adverse title, the disseizor acquires a new title founded on disseizin. He does not acquire or succeed to the title and estate of the disseizee, but is vested with a new title and estate, founded on and springing from the disseizin; and the title of the disseizee, if not wholly extinguished, has at least become inoperative in law, and is without a remedy to enforce it. (Arrington v. Liscom, 34 Cal. 381, and authorities there cited.) The new title thus acquired by the disseizor must of necessity correspond with that on which the disseizin operated, as he could not acquire by disseizin a greater estate than that held by the disseizee.

Id. at 73.

Obviously an adverse possessor claiming title under a state statute of limitations is out of the chain of title from the railroad and its purchasers. His title is one created by state law--not by private grant. He has no contractual relationship with the railroad company nor its successors. Unlike a purchaser and those in privity in the chain of title from the railroad, an adverse possessor would have no cause of action against the company for executing the release. Furthermore, there can be no good faith or equitable considerations stemming from the purchase from the railroad since the actions of the adverse possessor are by definition contrary to such considerations.

Fogal's "right" in this case was created in antithesis to that of the company.

Appellant and the majority opinion rely on Supreme Court rulings in Missouri Valley Land Co. v. Wiese, 208 U.S. 234 (1908);

Iowa Railroad Land Co. v. Blumer, 206 U.S. 482 (1907); Toltec Ranch Company v. Cook, 191 U.S. 532 (1903); and Deseret Salt Co. v. Tarpey, 142 U.S. 241 (1891), to support a view that an adverse possessor can succeed to the rights of an innocent purchaser for value. However, as stated in Lester J. Hamel, 74 I.D. 125 (1967), referring to those specific cases:

Assuming still that Hamel's predecessors had acquired the railroad's title to lot 9 by adverse possession, what was the effect of that action as against the United States, which still has the record title? The Supreme Court cases cited did not reach this question since in those cases the lands involved had been patented or certified (the equivalent of patenting) to the railroads or their successors and the controversies were between the adverse claimants and the holders of record title to the lands. \* \* \*

Id. at 130.

In addition to the fact that in those cases the Supreme Court was dealing with situations where the conflict was between private persons, and the record title had been conveyed by the United States, state law was applied in determining the rights of the respective parties. See also, Northern Pac. Ry. Co. v. Townsend, 190 U.S. 267, 270 (1903). Furthermore, they all arose prior to the Transportation Act. They were not concerned with the question involved here as to the effect of that Act and the release and whether an adverse possessor in the position of Fogal may seek to overturn the effect

of the release by the railroad. They are certainly not precedent for a conclusion that patent must issue in this case if it is found title once passed to the railroad company and the land had been sold to an innocent purchaser for value, where a party not in privity with the purchaser is the real party demanding patent. The Hamel decision comes closest to the present case, but does not stand as a holding which could support appellant's position. Indeed, it held that because the railroad company had filed a release under the Transportation Act of 1940 there was no authority to patent the land to the railroad. The decision does not disclose whether the railroad had ever conveyed the land to anyone so that the issue raised here was not discussed, but in view of the rationale used, I fail to see that would make any difference.

Another prior Departmental decision, Martin v. Lord, 59 I.D. 435 (1947), raised the question of an adverse possessor's right to purchase under section 5 of the Act of March 3, 1887, 43 U.S.C. § 897 (1970). That provision permitted a bona fide purchaser from a railroad company of lands within the primary grant to the company, but which lands were excepted from the grant, to purchase the lands from the United States subject to certain exceptions. The decision refused to decide the question whether the adverse possessor could be allowed to purchase under that Act. The Case noted, however, at 443, that a previous Departmental decision had ruled Martin was ineligible to purchase under the 1887 Act because

her asserted interest was based on a tax title. I submit that the reasoning which would preclude the holder of a tax title to purchase because she is not in privity with the original purchaser is as aptly applied to an adverse possessor as to the holder under the tax title. I see no basis for concluding that an adverse possessor could be considered a "bona fide purchaser" under section 5 of the 1887 Act. That provision merely affords a bona fide purchaser a personal privilege to purchase. It did not establish an absolute right protected from subsequent legislative reservations. *E.g., Anderson v. McKay*, 211 F.2d 798 (D.C. Cir. 1954), holding that a reservation of certain minerals by an Act passed before the purchaser applied for patent, but after he had purchased from the railroad, was effective. Also, the privilege must be exercised within a reasonable time. *Ramsey v. Tacoma Land Company*, 196 U.S. 360 (1905). The equities that Congress had in mind in permitting a bona fide purchaser to purchase land in which there was a defect of title would not apply to an adverse possessor.

It is hornbook law that a person can gain no rights against the United States by his adverse possession of land in the absence of a specific statute permitting purchase, such as the Color of Title Act, 43 U.S.C. § 1068 (1970). Nevertheless, the majority is permitting an adverse possessor to obtain rights by legalistic reasoning which fails to differentiate between the situation in the cases arising prior to the Transportation Act of 1940 and the

facts and law in this case, ignoring the principle cessante ratione legis, cessat et ipsa lex (the reason of the law ceasing, the law itself also ceases).

Let us consider Fogal's position in this case. He bases his title upon the acquisition of unpatented mining claims on January 27, 1934. Those claims were declared null and void by the Department in United States v. Fogal, A-28233 (May 10, 1960). Thereafter, on May 10, 1961, the Empire Consolidated Group (of which Fogal is a party) filed notices of location of placer mining claims for the same lands. The Group subsequently quitclaimed them to Fogal by deeds recorded March 24, 1971. Thereupon, Fogal obtained his quiet title decree in a state court. We cannot close our eyes to Fogal's position. The regulations regarding the issuance of patents under the Transportation Act of 1940 require that an application filed under the Act by the carrier for its purchaser must include certain detailed showings, including the following:

\* \* \* Full details of the alleged sale must be furnished, such as dates, the terms thereof, the estate involved, consideration, parties, amounts and dates of payments, made, and amounts due, if any, description of the land, and transfers of title. The use, occupancy, and cultivation of the land and the improvements placed thereon by the alleged purchaser should be described. All statements should be duly corroborated. \* \* \*

43 CFR 2631.1. That regulation goes on to require available documentary evidence, abstracts of title, etc., as necessary. It then states:

\* \* \* No application for a patent under this act will be favorably considered unless it be shown that the alleged purchaser is entitled forthwith to the estate and interest transferred by such patent. Evidence of a recorded deed of conveyance from the carrier to the purchaser may be required. \* \* \*

It is evident that the regulations envisage the beneficiary of the exception from the railroad releases to be an innocent purchaser for value from the railroad or someone in privity with the purchaser in a direct chain of title where the same estate and interest as the carrier would have is passed on. It obviously does not contemplate someone claiming under a different chain of title not in privity with the railroad.

Because of the release filed by the railroad, we cannot assume there is only a mere ministerial function to issue a patent. We have no authority to issue a patent except under the conditions permitted by Congress under the 1940 Act. Even if we assume the fact that the railroad company conveyed the land to an innocent purchaser for value and that title had passed to the railroad company, who may take advantage of the exception

to the release under the Act? The regulations require that the purchaser (and we can fairly rule someone in privity with the purchaser), show he is entitled to the estate and interest transferred by the patent. While an adverse possessor may be said to acquire a complete title where patent has issued from the United States, where patent has not issued, as between him and the United States, he is simply an adverse possessor. Fogal's position over the years has been directly contrary to the position now claimed that title to the land passed from the United States to the railroad company. Prior to the 1940 Act, Fogal was claiming the land under the United States mining laws. This is a direct recognition of the superior title of the United States and is inconsistent with a claim that title was then in the railroad. While this case need not rest on such a ground, it may certainly be argued that Fogal should be estopped to claim that title was in the railroad company at any time he claimed the land. There certainly cannot be a good faith claim by him that title passed to the railroad company. The United States has asserted its interest in the land by contesting Fogal's mining claims. Any reasonable rule of statutory construction to be applied here would defeat an interpretation of the 1940 Act to require a patent to issue to an adverse possessor under these circumstances.

Because Fogal fortuitously obtained a state court decree quieting title in him after having been defeated in a mining

contest, I cannot conclude he is an innocent purchaser for value within the meaning of the 1940 Act. Furthermore, even assuming the land had been sold to an innocent purchaser for value, I submit we have no authority to issue a patent in the absence of a clear showing that the innocent purchaser for value or someone in privity with him can show a right to the land as required by regulation 43 CFR 2631.1. This Department has rejected a simplistic argument that where title passed to the carrier and the carrier had conveyed to an innocent purchaser for value, a patent must issue confirming title in someone. Southern Pacific Company, 76 I.D. 1, 4 (1969). It emphasized that the saving clause of section 321(b) of the Transportation Act does not operate automatically without any designation of land to be excepted from the release. If land was not included in the list of excepted lands filed with the release, an inference arises that the land applied for had not been listed because the railroad did not suppose it came within the scope of the saving clause. If land was listed as excepted from the release no legal significance would attach to that fact. The decision stated:

\* \* \* The Transportation Act itself specifies the circumstances which except land from a release filed by a railroad company under the act and commits to the Secretary of the Interior the responsibility for determining where those circumstances exist. If the specified conditions are not found, the inclusion of a tract of land by a railroad company in its list of excepted lands cannot except that land from the

effect of a release. In other words, the list of sold lands submitted with the release filed in 1940 was for informational purposes only.

Id. at 4-5. The decision concluded by holding:

\* \* \* We find only that a railroad cannot invoke the saving clause of section 321 without showing that application for patent is made on behalf of one who can assert the rights of an innocent purchaser for value. [Footnote omitted.]

Id. at 6.

In footnote 2, the decision set forth the standard definition and criteria in determining an "innocent purchaser for value":

2/ The term "innocent purchase[r] for value," as used in the Transportation Act, must be understood in its ordinary commercial sense, and it has long been understood by the courts to describe one who purchases in good faith and for value. Chapman v. Santa Fe Pac. R. Co., 198 F. 2d 498, 502 (D.C. Cir. 1951). It is essentially equivalent in meaning to "bona fide purchaser." See Words and Phrases, Innocent Purchasers for Value.

It is well settled that one who claims protection as a bona fide purchaser must be a purchaser for value and that the burden is upon him to show that he has paid value. See 46 Am. Jur., Sales, § 465. It is equally settled that one who himself qualifies as a

bona fide purchaser is entitled to protection as such notwithstanding any lack of qualifications on the part of his immediate grantor, the original purchaser, or any intervening purchaser. 73 C.J.S. Public Lands § 167; 92 C.J.S. Vendor & Purchaser § 321. This latter principle has been expressly applied in cases arising under the act of March 3, 1887, as amended, 43 U.S.C. §§ 894-899 (1964), and involving purchasers of lands in canceled railroad grants. See Instructions, 11 L.D. 229 (1890); Union Pacific Ry. Co. et al. v. McKinley, 14 L.D. 237 (1892); Union Colony v. Fulmele et al., 16 L.D. 273 (1893); Sethman v. Clise, 17 L.D. 307 (1893); Ray et al. v. Gross, 27 L.D. 707 (1898). It is clear, however, that the protection of the statute could be invoked only by, or for the benefit of, a bona fide purchaser. See United States v. Southern Pacific R. R. Co., 184 U.S. 49, 60 (1902), in which relief was denied to one who entered into an agreement to purchase land from a party not entitled to invoke the protection of the 1887 act for the purpose of securing for that party the protection which it could not seek in its own right.

Id. at 5.

The application in this case was properly rejected because on its face it showed it was made on behalf of someone who is not an innocent purchaser for value and who cannot stand in the position of that purchaser by virtue of privity of title from him. This position is most in keeping with the purposes and policies manifest by the Transportation Act. There is no authority in the law for this Department to issue a patent to the railroad which will be on behalf of one claiming only as an adverse possessor even if the land is found to have been nonmineral in character and the

original purchaser from the railroad is found to have been an innocent purchaser for value. A ruling contrary to this position opens the door to matters which have been deemed to have been closed over 30 years ago and affords opportunities for fraudulent claims by persons who have never recognized title in the railroad company and its transferees.

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Joan B. Thompson  
Administrative Judge

