BENTON C. CAVIN

IBLA 76-607 Decided June 30, 1977

Appeal from decision of California State Office, Bureau of Land Management rejecting color of title application CA 3542.

Set aside and remanded.

1. Color or Claim of Title: Generally

Since land which falls within an exception to a proclamation withdrawing land for federal purposes, is not then withdrawn, the withdrawal does not preclude the initiation and perfection of a claim under the Color of Title Act on land excepted from the withdrawal. 43 U.S.C. § 1068.

APPEARANCES: Benton C. Cavin, pro se.

OPINION BY ADMINISTRATIVE JUDGE RITVO

Benton C. Cavin has appealed from a decision dated April 27, 1976, of the California State Office, Bureau of Land Management, rejecting his application filed on February 17, 1976, to purchase 40 acres of public land, NE 1/4 NE 1/4, section 10, T. 6 S., R. 22 E., Mount Diablo Meridian, California, pursuant to the Color of Title Act, 43 U.S.C. § 1068 (1970). The State Office, BLM rejected appellant's application on the basis that the entire township was withdrawn on February 14, 1893, as part of the Sierra National Forest, while the evidence of a chain of title begins with a deed dated October 5, 1899.

The application was originally filed as a Class 2 claim. However, in his Statement of Reasons appellant requests that the applicability of both Classes 1 and 2 be considered. 43 CFR 2540.0-5(b) states:

> 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

> 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 of class 2 is one which has been held in good faith and in peaceful, adverse possession by a claimant, his ancestors or grantors, under claim or color of title for the period commencing not later than January 1, 1901, to the date of application, during which time they have paid taxes levied on the land by State and local governmental units. A claim is not held in good faith where held with knowledge that the land is owned by the United States. A claim is not held in peaceful adverse possession where it was initiated while the land was withdrawn or reserved for Federal purposes.

Cavin's chain of title originates with a deed from Madera Flume and Trading Co. to Arthur Hill, dated October 5, 1899, and then by way of various mesne conveyances to appellant in March 1975.

Appellant alleges that his ancestors have cultivated the subject land since 1942, and have made improvements on it since 1944.

There is reason to believe taxes were first paid on the property in 1891 by one Frank Keltie. There are county records indicating taxes have been paid continually since 1900 beginning with Arthur Hill.

The land in question was withdrawn via Proclamation No. 43, dated February 14, 1893, by President Benjamin Harrison for the Sierra Forest Reserve.

A homestead entry of John McComb on the land was allowed on April 17, 1894. However, on June 2, 1903, it was cancelled for failure to prove up.

Appellant presents three arguments relating to his claim or color of title. He believes any one to be sufficient to uphold his claim.

Appellant believes the original deed of the land was from the United States Government to an unknown grantee, perhaps Madera Flume & Trading Co. (Madera). However, appellant has been unable to prove any conveyance before October 5, 1899, because the County Records have been discarded and are now in private hands. It should be noted that despite this handicap, the appellant has done a most admirable job of documenting transactions in the vicinity of the subject land.

Appellant offers circumstantial evidence of an entry upon the land in 1889 or prior thereto by Madera. Madera either purchased the property or acquired a right-of-way for all surrounding properties upon which they began construction of a narrow gauge railroad in 1889. Appellant finds it curious that Madera would acquire an interest in all lands on which they built their railroad with the exception of the subject property, especially where the line would be vulnerable to severance by homesteaders or cash purchasers under the Timber & Stone Act of 1878. Therefore he wishes an inference to be drawn that Madera must also have acquired an interest in the subject land prior to constructing the railroad, particularly when Madera could have acquired a right-of-way or purchased the land itself under the Timber & Stone Act, as they did for many contiguous tracts.

Appellant next argues that color of title commenced prior to 1893. Appellant contends Madera built a railroad across the land only because it was no longer open for entry in 1889, as someone had already entered upon it. Nearly all the land in the area was purchased by the end of 1889, and most of it even earlier. Again, appellant believes the records to prove the original conveyance are not available or are erroneously entered or filed. However, he believes if they were available they would show title to the land in Madera. To support this argument appellant directs attention to a release of a judgment lien dated April 7, 1899, which states the subject property stood of record in the name of Madera Flume & Trading Co. on that date.

Appellant's third and final argument is the subject land was not withdrawn for federal purposes on February 14, 1893, because it satisfied the exceptions to Proclamation No. 43 which provides:

> Excepting from the force and effect of this proclamation all lands which may have been, prior to the date hereof, embraced in any legal entry or covered by any lawful filing duly of record in the proper United States Land Office, or upon which any valid settlement has been made pursuant to law, and the statutory period within which to make entry or filing of record has not expired: and all mining claims duly located and held according to the laws of the United States and the rules and regulations not in conflict therewith:
>
> Provided that this exception shall not continue to apply to any particular tract of land unless the entrymen, settler or claimant continues to comply with the law under which the entry, filing, settlement or location was made.

As evidence of the land being subject to the exception, appellant points to the homestead entry of John McComb. The Proclamation is dated February 14, 1893, and the entry of John McComb is on April 17, 1894. Hence if the land had been withdrawn, the application for the Homestead entry would not have been allowed. Appellant contends there is an inconsistency and he concludes the answer is the subject property was covered by the exception to the withdrawal and was not withdrawn for federal purposes as of October 5, 1899.

We agree with the appellant that the land in question may have been covered by an exception to the withdrawal. While the records do not show that there was an entry or valid settlement on the land prior to the date of the withdrawal, they do show that the land office allowed McComb's homestead entry over a year after the date of the first withdrawal. The entry could only have been allowed if the land had not been withdrawn. Further, when the entry was cancelled on June 3, 1903, it was for failure to prove up timely, and not because the entry had been inadvertently allowed. One possible explanation is the land may have been settled upon prior to the allowance of the homestead entry. Whatever the reason we must conclude that the land was not withdrawn until 1903 at the earliest so that in 1899, when Cavin's color of title claim originates, the land was not withdrawn. When color of title to the land has originated before the land was under reservation, the land remains open to the initiation of a color of title claim even though it may have been within the outer boundaries of the withdrawal. Asa V. Perkes, 9 IBLA 363, 80 I.D. 209 (1973); Myles Stephanson, 16 IBLA 252 (1974); Clement Vincent Tillion, Jr., A-29277 (April 12, 1963).

Accordingly, we conclude that it was improper to reject Cavin's color of title claim on the ground that the land it covers was withdrawn before his claim originated. It must be reexamined on its merits. Since the land is within the boundaries of a national forest the proper office of the Forest Service should be notified of the application. See 43 CFR 1862.4.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision below is set aside and remanded for consideration in accordance with this decision.

Martin Ritvo
Administrative Judge

I concur:

Anne Poindexter Lewis
Administrative Judge

ADMINISTRATIVE JUDGE THOMPSON DISSENTING:

To find that the color of title claim in this case originated before the land was withdrawn we must infer from the evidence facts which are not shown. The undisputed facts in this case are the date of the withdrawal proclamation on February 14, 1893, the allowance of the homestead entry to John McComb on April 17, 1894, the cancellation of that entry on June 3, 1903, and a conveyance of the land initiating appellant's color of title on October 5, 1899. Two possible inferences may be drawn from the allowance of the homestead entry in 1894: (1) that some act of settlement or other event affected the land status so as to prevent attachment of the withdrawal in 1893; or, (2) that the entry was erroneously allowed and was really null and void in the face of the withdrawal. Judge Ritvo would draw the first inference and conclude the withdrawal did not attach to the land. At this posture of the case I would not do so.

Appellant has given reasons why there might have been some prior entry, conveyance, or other transaction affecting the land before 1893, but there are no records of such occurrences. I am sympathetic with the problems he faces in this case to try to establish evidence to support his position. However, I would not rest a conclusion that the withdrawal did not attach to the land in 1893 simply upon the inferences drawn by Judge Ritvo. At most, I would afford appellant an opportunity for a fact-finding hearing, as he has requested, pursuant to 43 CFR 4.415 before an Administrative Law Judge. The purpose of the hearing would be to permit him to present evidence under oath to establish the initiation of his color of title claim prior to the withdrawal, the date the withdrawal attached to the land, if it did, and other evidence going to the validity of his claim. Because the lands lie within a national forest, the Forest Service would be given notice of the hearing and an opportunity to cross-examine witnesses and present evidence on the issues presented. 43 CFR 1862.4.

Joan B. Thompson
Administrative Judge