

JOHN STUART HUNT
SHERMAN M. HUNT

IBLA 76-183

Decided July 22, 1977

Appeal from decision of Eastern States Office, rejecting Color of Title Application ES 13250.

Set aside and remanded.

1. State Grants--Swamplands

Although a grant to a state pursuant to the Swamp Land Act of 1849 or 1850 is a grant in praesenti, in that the state is immediately vested with an inchoate equitable title, the legal title does not pass until the Secretary has determined that the land is swamp in character and otherwise available for disposition.

2. Res Judicata--Rules of Practice: Appeals: Generally--
Rules of Practice: Appeals: Failure to Appeal--
Swamplands

Where a state swampland selection has been rejected on the ground that the land selected has been disposed of, but in fact that land was available to the state, the judgment is valid and binding until set aside. Since the Secretary has jurisdiction to determine whether the land selected

is available, he has jurisdiction to decide erroneously. The erroneous decision will not be set aside where the state did not appeal and the decision has remained unchallenged for over 100 years, the state itself sold the land to a color of title applicant's predecessor, and an adverse right has intervened.

3. Color or Claim of Title: Generally--Swamplands

A color of title claim stemming from a tax sale by a state in 1900 to a color of title applicant's predecessor in interest on which taxes have since been paid is an adverse claim sufficient to warrant the Department in not setting aside an 1853 decision erroneously rejecting a swampland selection or from not giving a new state selection priority over the color of title application.

APPEARANCES: Michael R. Mangham, Esq., Hargrove, Guyton, Ramey & Barlow, Shreveport, Louisiana; C. Walter Harris, Esq., Washington, D.C., for appellants.

OPINION BY ADMINISTRATIVE JUDGE RITVO

John Stuart Hunt and Sherman M. Hunt appeal from the July 30, 1975, decision of the Eastern States Office, Bureau of Land Management (BLM), which rejected their application to purchase the NW 1/4 NW 1/4, section 4, T. 16 N., R. 5 E., L.M., Richland Parish, Louisiana, filed pursuant to the Color of Title Act, 43 U.S.C. § 1068 (1970). The State of Louisiana has also selected the land under the Swamp and Overflowed Lands Act of September 28, 1850, 43 U.S.C. § 982 (1970)

under ES 15099. Appellants' application was rejected after the BLM determined that equitable title to the land had passed to the State of Louisiana pursuant to the swamp and overflowed land grants of 1849 and 1850, 9 Stat. 352 and 9 Stat. 519, respectively, as amended, 43 U.S.C. § 981 et seq. (1970), and thus was unavailable for disposition. The State Office held that the grant under the Swamp Land Act is a grant in praesenti and once it is determined that the lands are of the character described in the Act, the state's inchoate title becomes perfect as of the date of the Act, citing Michigan Land and Lumber Co. v. Rust, 168 U.S. 589 (1897), and 43 CFR 2625.0-3(a) and (b).

Appellants deny that the Department lacks authority to settle their claim in their favor, also citing Michigan Land and Lumber Co. v. Rust, supra. Moreover, argue the appellants, this is precisely the kind of claim contemplated by the Color of Title Act, 43 U.S.C. § 1068 (1970). Finally, appellants assert that the equities of the case weigh heavily in their favor.

The Color of Title Act, 43 U.S.C. § 1068 (1970), provides that the Secretary of the Interior shall convey title to a claimant who has held a tract of public land under claim or color of title in good faith and peaceful adverse possession for more than 20 years and has placed valuable improvements on the land or has cultivated part of it, and he may convey title to a claimant who has adversely

possessed a tract of public land under similar claim or color of title since not later than January 1, 1901, and has paid the state and local taxes levied on the land since that date.

The implementing regulations, 43 CFR Part 2540 and 2540.0-5(b), label the first kind of claim "class 1" and the second kind, "class 2." The claim in this case is a class 2 claim. The facts are as follows.

Duncan W. Murphy entered the NW 1/4 NW 1/4 of section 4, T. 15 N., R. 5 E., L.M., and other lands on August 25, 1848, under military bounty warrant 14981 and received patent to the land dated November 1, 1849. Unfortunately, the patent was entered in General Land Office tract books as NW 1/4 NW 1/4, section 4, T. 16 N., R. 5 E., L.M., instead of T. 15 N. 1/ After enactment of the swamp land grant in 1849, the State of Louisiana applied for patent for the land in section 4, T. 16 N., R. 5 E., L.M. By decision of the General Land Office (predecessor of the BLM) dated June 22, 1853, the application for patent to the NW 1/4 NW 1/4, section 4, T. 16 N., L.M., was rejected on the ground that the land had already been disposed of to another person. 2/ Apparently, no appeal was ever taken from this decision.

1/ The homestead entry of Murphy embraced SE 1/4 SE 1/4 sec. 32, SW 1/4 SW 1/4 sec. 33, T. 16 N., R. 5 E., NW 1/4 NW 1/4 sec. 4, NE 1/4 NE 1/4 sec. 5, T. 15 N., R. 5 E., L.M.

2/ After rejection of the State's application for NW 1/4 NW 1/4 sec. 4, T. 16 N., R. 5 E., Louisiana applied for NW 1/4 NW 1/4 sec. 4, T. 15 N., R. 5 E., and received proof of title in approved List No. 1, Monroe Land Office, May 6, 1852.

In 1898, the State of Louisiana adopted Act No. 170, approved July 14, 1898, under which the land at issue became subject to state ad valorem taxes. On July 23, 1900, the NW 1/4 of NW 1/4 of section 4, T. 16 N., R. 5 E., assessed in the name of Duncan W. Murphy, was sold by the State of Louisiana at tax sale for 1899 taxes to F. G. Hudson, W. F. Cummings and Hy. Bernstein for the sum of \$11.87. Since that time, the land has changed hands sixteen (16) times among private parties. In addition, the land has actually been used and possessed as timber land. The landowners have sold timber, managed the timber growth, selectively cut and marketed the timber production. Further, each year since 1900 up to and including 1973, the State of Louisiana and Parish of Richland have assessed and collected taxes on the NW 1/4 of NW 1/4, section 4, T. 16 N., R. 5 E.

Appellants were informed by the Eastern States Office, BLM, on November 16, 1973, that the land had in fact never been patented. On January 8, 1974, they filed their application for patent, ES 13250, under the Color of Title Act, supra. The State of Louisiana, as we have seen, also filed an application, ES 15099, on November 20, 1973, for patent to the land pursuant to both Swamp Land Acts of 1849 and 1850.

The case cannot be disposed of solely on the ground that if the land was swamp in character in 1849 or 1850 the title passed to the state and nothing else matters.

More weight must be given, in our view, to the effect of the 1853 decision, the state's tax sale in 1900, and appellant's (and his predecessors') possession of the land since then.

The cases discussed below establish that, for reasons of fairness and sound policy, a swamp land grant, although it is a grant in praesenti, must be found to be swamp in character and available for disposition under the grant before legal title passes and that the Secretary or his delegate has jurisdiction to decide the eligibility of land for the swamp land grant. Having such jurisdiction, his judgment, even though erroneous, is valid and binding until set aside.

Further, whether consisting of the equitable title or based upon preference, rights can be, and are, lost by acquiescence in an erroneous decision for a lengthy period of time, whether the error is one of law or of fact, or stems from erroneous public records. The intervention of an adverse right inhibits the Department from reconsidering its past error, despite the fact that the land is still within the public domain. A valid color of title claim is an adverse right. Therefore the appellants' application is to be processed, and if all is regular, allowed and the State's application then rejected.

We now turn to a detailed discussion of these propositions.

[1] While the swamp land grants are grants in praesenti and equitable title would have passed in 1849 or 1850, all else being regular, the acts were not self-executing. Since the act applied only to swamps or overflowed lands and lands remaining unsold, 43 U.S.C. § 982 (1970), the Department was obligated to examine the facts and records to see whether the land was indeed swamp in character and, if so, was still available for disposition. The Secretary may investigate the character of the land and its eligibility for disposition, as long as the title remains in the United States. Michigan Lumber Co. v. United States, supra at 593.

In U.S. v. Minnesota, 270 U.S. 181, 202-203 (1926), the Court explained the meaning of saying the swampland grant was a grant in praesenti:

By the act of September 28, 1850, Congress granted to the several States the whole of the swamp lands therein then remaining unsold, c. 84, 9 Stat. 519. The first section was in the usual terms of a grant in praesenti, its words being that the lands described "shall be, and the same are hereby, granted." The second section charged the Secretary of the Interior with the duty of making out and transmitting to the governor of the State accurate lists and plats of the lands described, and of causing patents to issue at the governor's request; and it then declared that on the issue of the patent the fee simple to the lands should vest in the State. The third section directed that, in making out the lists and plats, all legal subdivisions the greater part of which was wet and unfit for cultivation should be included, but where the greater part was not of that character the whole should be excluded. The question soon arose whether, in view of the terms of the first and second sections, the grant was in praesenti and took effect on the date of the Act, or rested in promise until the issue of

the patent and took effect then. The then Secretary of the Interior, Mr. Stuart, concluded that the grant was in praesenti in the sense that the State became immediately invested with an inchoate title which would become perfect, as of the date of the Act, when the land was identified and the patent issued, 1 Lester's Land Laws, 549. That conclusion was accepted by his successors, was approved by the Attorney General, 9 Op. 253, was adopted by the courts of last resort in the States affected, and was sustained by this Court in many cases. French v. Fyan, 93 U.S. 169, 170 [1876]; Wright v. Roseberry, 121 U.S. 488, 500, et seq. [1887]; Rogers Locomotive [Machine] Works v. [American] Emigrant Co., 164 U.S. 559, 570 [1896]; Work v. Louisiana, 269 U.S. 250 [1925]. A case of special interest here is Rice v. Sioux City & St. Paul R. R. Co., 110 U.S. 695 [1884]. The question there was whether the Act of 1850 operated, when Minnesota became a State in 1858, to grant to her the swamp lands therein. The Court answered in the negative, saying that the Act of 1850 "operated as a grant in praesenti to the States then in existence," that it "was to operate upon existing things, and with reference to an existing state of facts," that it "was to take effect at once, between an existing grantor and several separate existing grantees," and that as Minnesota was not then a State the Act made no grant to her. [Emphasis supplied.]

As the quote makes clear, the in praesenti grant did not become effective until the Secretary made the determinations required of him under the Swamp Land Act. He had to decide (1) whether the land had been previously sold and (2) whether it was swamp in character.

The Supreme Court held in Work v. Louisiana, 269 U.S. 250, 260 (1925), that mineral lands were not excluded from the swampland grant to Louisiana, and the Secretary could not refuse to issue a patent to such land pending his determination of its mineral character. The Court then held:

3. A question remains as to the effect of the decree awarding the injunction. This, after commanding the Secretary to vacate the ruling operating to withhold title from the State for any reason dependent upon the mineral character of the lands or to require that their non-mineral character be shown, contained the following supplemental clause: "and further restraining him, and them from making any disposition of said described lands or from taking any action affecting the same save such immediate steps as are necessary to the further and final recognition of plaintiff's rights under the acts of March 2, 1849 (9 Stat. 352) and September 28, 1850 (9 Stat. 519), to the end that evidence of title may be given to plaintiff as by said acts provided and required." If, as urged, the effect of this supplemental clause is to divest the United States of title to the lands and leave the Secretary to do nothing but furnish the State evidence of title in final recognition of its asserted rights, the decree in this respect is plainly erroneous, aside from any question as to the scope of the bill or the necessary presence of the United States as a party. The State has not as yet finally established its right to the lands, and the administrative processes necessary thereto are not complete. The Secretary, it appears, has not as yet determined that they were swamp and overflowed lands. The finding of the Commissioner that they were "swamp or overflowed" was not brought in question before the Secretary, and his decision involved no approval of such finding, but related merely to the ruling of the Commissioner requiring the State, independently of this finding, to establish the non-mineral character of the lands. The Secretary, in the exercise of the administrative duty imposed upon him, is necessarily required, before furnishing evidence of title under either of the Acts, to determine whether the lands claimed were in fact swamp lands; and he may not be restrained from investigating and determining this in any appropriate manner.

The decree is inartificially framed. We think that the supplemental clause which we have quoted, in effect requires the Secretary to recognize that the State has already established its right to the lands and to do nothing further in reference to them except to furnish it evidence of title in final recognition of such established right, and restrains him from investigating and determining, without reference to the mineral character of the lands, whether they were

in fact swamp and overflowed lands, before giving final recognition to such right as the State may establish under either of the Acts and issuing to it any evidence of title. The decree is accordingly modified by striking out this supplemental clause. Thus modified it should stand.
[Emphasis supplied.]

Again, it is clear that the Swampland Act leaves to the Secretary the right and duty to determine whether the land sought by the State meets the qualifications of the Act. 3/

Since the grant applies only to lands "remaining unsold," one of the two issues the Secretary must decide is whether the land is unsold. Mays v. Kirks, 414 F.2d 131, 134 (5th Cir. 1969); U.S. v. O'Donnell, 303 U.S. 501 (1938); Warner Valley Stock Company v. Smith, 9 App. D.C. 187, reversed on other grounds, 165 U.S. 28 (1897). Here the Secretary decided, albeit erroneously, that the land had been sold. We must examine the consequences of an erroneous decision.

[2] When the Department has made a determination that for some reason the title did not pass, its decision is of some consequence. Whether it was right or wrong, it denied the State's claim and left the land in question as public domain. It is well established that an erroneous decision which the Department had authority to make

3/ For numerous citations, see cases collected in 43 U.S.C.A § 982, n. 23.

will not be set aside where the decision has remained unchallenged for a lengthy period of time and an adverse right has intervened.

The effect of an erroneous decision was thoroughly discussed in a case raising a similar issue. State of New Mexico v. Robert S. Shelton, 54 I.D. 112 (1932). There, New Mexico held the same status as Louisiana does here. New Mexico had earned equitable title to an indemnity school land selection by performing all things needful to perfect its selection, but the Secretary had not approved the selection. The Secretary, acting under a misapprehension of law that a later withdrawal cut off the State, rejected and canceled the selection. The land was thereafter restored to entry and opened to homestead entry. About 14 years later the State appealed to have its selection reinstated.

In discussing the effect of an erroneous decision holding that a state indemnity school selection in all respects regular and complete could be defeated by a subsequent withdrawal, Secretary Edwards first pointed out that in many cases the Department has refused to correct applications rejected because of an erroneous interpretation of the law where there was acquiescence or laches. He then stated:

The appellants do not rely, however, on the fact that they did not acquiesce in the erroneous decision. Their application for reinstatement appears to be based chiefly on the contention, deduced from certain language

of the Supreme Court in Payne v. New Mexico, *supra*, and Wyoming v. United States and related cases, that the Department's judgment of cancellation was absolutely void and it was immaterial whether the State ignored it or not. That contention is not tenable. It should not be overlooked that the State had merely the equitable, not the legal title. Until legal title passes from the Government, inquiry as to all equitable rights comes within the cognizance of the Land Department. Brown v. Hitchcock (173 U.S. 473, 476 [1899]); Plested v. Abbey (228 U.S. 42 [1913]). Confessedly the land belonged to the United States when it was listed, and the Land Department had jurisdiction to determine whether it should be listed to the State or not. "Having such jurisdiction, it had jurisdiction in making the necessary determination to render an erroneous and voidable judgment." Stutsman v. Olinda Land Company (231 Fed. 525, 527 [1916]). The judgment, though voidable, was entitled to respect until set aside by direct attack in some manner recognized by law. Noble v. Union River Logging Co. (147 U.S. 165 [1893]); Burke v. Southern Pacific Railroad Company (234 U.S. 669 [1914]). Want of jurisdiction must be distinguished from error in the exercise of jurisdiction. Where jurisdiction has once attached, mere errors and irregularities in the proceedings, however grave, although they may render the judgment erroneous and subject to be set aside in a proper proceeding for that purpose, will not render the judgment void. Until set aside it is valid and binding for all purposes and can not be collaterally attacked. See "Judgments," sec. 39 (33 C.J. 1078). [Emphasis supplied.]

The case of Leutholtz v. Hotchkiss (259 Pac. 1117 [1927]), decided by the Court of Appeals of the First District, Division 2, California, shows that the court considered a contention substantially the same as appellants are making here, in connection with a state of facts closely paralleling those at bar. The case also shows the importance of the elements of acquiescence in the same error of law by the Department that is conceded to have been committed in the case at bar, and the application of the doctrine of laches where the State or one claiming under it has been dilatory in seeking to enforce its or his equitable rights.

In that case, in January, 1908, one Clarrage applied to purchase the land--then public land of the United States--from the State. The State filed indemnity lieu selection for the same February 17, 1908,

issued a certificate of purchase to Clarrage in 1912, who sold the land to defendant on March 12, 1921, and gave him a grant deed January 9, 1923. By reason of a classification of the land as valuable for oil and gas subsequent to the completion of the selection, the State's application was suspended in 1909, and on July 17, 1916, the State and its transferee received notice of the Commissioner's order, requiring them within 30 days to accept a patent with reservation of oil and gas, or appeal, to which no reply was made by either, and the selection was ordered canceled July 20, 1927. Neither the transferee nor his grantee ever occupied the land, and the land, in so far as the record showed, being open for prospecting, an oil and gas permit was issued to plaintiff on May 23, 1921, who entered thereon and drilled a well to the depth of 2,600 feet at an expense of \$70,000. The court, after stating the rule in the Supreme Court cases relied on in the case here at bar, and observing that the Land Department's action on the selection was erroneous, said:

The trial court concluded that the State and its transferee had accepted the construction of the law as announced by the Commissioner of the General Land Office by failing to appeal from his decision to the Secretary of the Interior and thereby abandoned his claim; "also that defendant is barred from relief by the court by his long delay, including that of his predecessor in interest, in asserting an interest in the land.

"Appellant attacks these conclusions. He claims that an equitable interest having once vested in the State upon making the lieu land selection, it was not defeated by the erroneous ruling of the Land Department on a question of law; that, it being a mistake of law, the Secretary of the Department of the Interior should, and can, correct it at any time on application; that it is his function and duty to correct such mistake, and until the Secretary has determined the question of whether the land was known to be mineral or nonmineral at the time of selection, the appellant's equitable title cannot be questioned. In support of the authority or duty of the Secretary to correct a mistake of law,

appellant cites the case of Gage v. Gunther, 136 Cal. 338, 68 P. 710, 89 Am. St. Rep. 141 [1902]. This might be urged, were it not for the intervening rights of the respondent, and it could be said without question that appellant and his predecessors in interest had not by their acts and delay led one to the conclusion that they had abandoned whatever right they may have had to the land. Appellant did not avail himself of his right of appeal to the Secretary of the Interior from the Commissioner's ruling. The State's selection was canceled, and both the State and Clarrage acquiesced in such cancellation. True, the right once having vested, it could not be lost merely by the subsequent discovery of the land's being mineral in character, but the right could be, and was, we think, lost by permitting the Government's cancellation of the selection duly made according to its rules and regulation to stand for the time it did. After the cancellation, the prospecting permit was duly issued to respondent, and at that time it does not appear that respondent was aware of any outstanding claim to the land. The land was open for prospecting for oil so far as the Government's records showed. Neither appellant nor his grantor has ever occupied the land. Appellant took no steps to establish any equitable interest he may have had in the land until suit was brought by respondent to quiet title to her prospecting right, and this notwithstanding the fact that the Supreme Court of the United States had decided the Payne case, supra, and Wyoming case, supra, some two years before. Such delay as is shown here must, we think, be treated as abandonment of his claim. The appellant slept on his rights. As was said by the court below: [Emphasis supplied.]

"A party defeated by the decision of the Land Department may not wait many years after an adverse decision there, especially of an intermediate department, and, when the Supreme Court shall have announced a new construction of the law in an entirely different action, successfully reassert his claim under

such circumstances as are here disclosed. * * * The Government, through its cancellation of the State selection, reasserted its title to the land, and resumed control of it for a much longer period than the statute of limitations (Code Civ. Proc. Secs. 315-328) provides, and which may be relied upon in adverse proceedings to quiet title to real property."

For the reasons stated, the judgment is affirmed.

The cases above discussed are readily distinguishable from the instant case. In the latter, nothing appears wherein the State by its acts acquiesced in the erroneous decision of the Department, or abandoned its claim. On the contrary, at all times it, through its lessee, has continuously asserted its equitable title by actual possession and improvement of the land, thus effectually precluding the lawful initiation of any rights under the homestead laws. The homestead entries must be canceled and the State's selections should be reinstated and the list approved.

The Commissioner's decision is accordingly REVERSED.

54 I.D. 119-121.

The language in the decision is a forceful statement of the consequences flowing from an erroneous decision long acquiesced in.

In an earlier case, Honey Lake Valley Company, 48 L.D. 192 (1921), the Department considered a situation in which a state indemnity selection, otherwise proper, was rejected in 1915 on the basis of an interpretation of law, as to the effect of a later withdrawal on a pending selection, which later was held by the Supreme Court to be incorrect. The land was thereafter entered in 1918 under the

desert land law. The state filed a second selection in 1919, which it said was amendatory of its first one. The Commissioner of the General Land Office ruled that the first selection was canceled of record on July 15, 1915, was not subject to amendment and the second selection was properly rejected for conflict with a lawful entry of record. In affirming that decision the Department held:

In determining what rights, if any, the State may have under the original, or first selection (0405), filed March 20, 1908, the Department has considered the issues in the light of the opinion rendered by the Supreme Court of the United States, March 7, 1921, in the case of *Payne, Secretary of the Interior et al. v. The State of New Mexico* (255 U.S., 367 [1921]).

In so determining two questions necessarily arise, first, whether, recognizing the right of the present homesteader, Rogers, a subsequent change in the interpretation of a statute justifies the reopening of a claim formerly disposed of adversely in accordance with the then prevailing rule or construction placed upon a similar statute; and, secondly, whether or not even though it may have acquired an equitable right, or title, under its former filing (0405), within the meaning of the recent opinion of the Supreme Court hereinbefore referred to and rendered in a proceeding separate and distinct from the case under consideration, such right, or title, had been lost by the State through its laches.

The first proposition needs little or no discussion. It could not be seriously contended that upon a change by either this Department, or the courts, in the interpretation of any law, which different construction was brought about through the diligent prosecution of the claim of another in a separate and distinct proceeding having no bearing upon this case, the reopening of a former case properly disposed of in accordance with the governing rule then in force, would be justifiable to the detriment of the property rights acquired by another in the meantime. Such a course of procedure would bring about chaotic conditions and promote endless litigation.

In this connection it was held in the case of Thomas Hall (44 L.D., 113, 114 [1915]) --

"It is a well-settled doctrine that a final adjudication will not be later disturbed because of a subsequent change in the construction of the law which governed the case at the time it was originally adjudicated. This rule has been generally enforced by this Department, even in cases where the Department's construction of statutes has been declared erroneous by the Supreme Court. (Frank Larson, 23 L.D., 452 [1896]; Mee v. Hughart et al., 23 L.D., 455 [1896].)"

It would be immaterial as the record stands before this Department whether or not the State of California acquired an equitable right, or title, under its former selection (0405), within the meaning of the Supreme Court's opinion in the case of Payne, Secretary of the Interior et al. v. The State of New Mexico, supra. In the case at bar the cancellation order of the original selection was entered July 31, 1915. No action was taken by the State until January 20, 1919, with the view to reselecting the land as it had a right to do in its own interest or that of its transferee. During the time that elapsed from date of cancellation of the selection, and entry of the land by Hender, March 21, 1916, the State failed to avail itself of the privileges accorded by the governing regulations and principles enunciated in the case of Albert M. Salmon, * * *. [44 L.D. 491 (1915).]

The State will not at this late date be heard to say that the former selection should be reinstated, or amended, and the entry of contestant, Rogers, canceled. The State's laches and the intervening adverse claim bar the assertion of any such contention. As was said (syllabus) in Moran v. Horsky (178 U.S., 205 [1900]) --

"A neglected right, if neglected too long, must be treated as an abandoned right, which no court will enforce."

The rule applicable here is well stated in Galliher v. Cadwell (145 U.S., 368, 373 [1892]), wherein the court stated that-

"* * * [L]aches is not like limitation, a mere matter of time; but principally a question of

the inequity of permitting the claim to be enforced -- an inequity founded upon some change in the condition or relations of the property or the parties."

The Department concurs in the conclusion reached by the Commissioner in the decision appealed from which is hereby affirmed.

48 L.D. 194-195.

The Department has also found that a state could lose its right to a designated school section, to which it has a right of the same nature as it does to swamp lands, *i.e.*, a grant *in praesenti*, State of Michigan, 8 L.D. 308, 310 (1899), by action which amounts to a waiver or is sufficient for estoppel. State of Colorado (On Rehearing), 49 L.D. 341 (1922). ^{4/}

Here Louisiana acquiesced in an erroneous decision for over 100 years and indeed itself sold the land for a tax delinquency based on the erroneous land office record.

The consequences of a failure to appeal a decision which is erroneous because it was based on incorrect public land records

^{4/} In another situation in which the claimant has also carried equitable title, a failure to appeal from an erroneous decision holding a mining claim invalid was held to prevent a later attack on that decision. Gabbs Exploration Company, 67 I.D. 160, 165 (1960); aff'd Gabbs Exploration Co. v. Udall, 315 F.2d 37 (D.C. Cir. 1963), cert. denied, 375 U.S. 822 (1963). See also John W. Roth, 8 IBLA 39, 41 (1971).

was examined at length in Charles D. Edmonson, et al., 61 I.D. 355 (1954). The Department held that even where the erroneous ground for rejecting a preference-right application was a matter of fact reflected in the official records of the Bureau of Land Management and within the peculiar competency of the official in charge of the records and acting upon that application, and the applicant had no reason to question the factual determination, his application could not be reinstated with priority over a subsequent applicant. The Department concluded that to hold otherwise would place such lease titles in jeopardy and would nullify the idea of administrative finality. 5/

Finally, the Department again and again has refused to reexamine swamp land cases where the land had been held not to be swamp in character and many years have elapsed since the original decision. State of Louisiana, 61 I.D. 170 (1953); John C. Armas, A-26545 (1952).

To recapitulate, the cited cases establish, for reasons of fairness and sound policy, that a swamp land grant, although it

 5/ In Edmonson, the Department reexamined a decision Bettie H. Reid, Lucille H. Pipkin, 61 I.D. 1 (1952), in which it had held that a first qualified applicant for an oil and gas lease retained her preference right even though she failed to appeal from a decision rejecting her offer on the ground that land had been withdrawn; in fact the land had not been withdrawn, but Reid had no reason to question the manager's decision. It held that Reid must be reversed. For a full discussion, see 61 I.D. 362-365.

is a grant in praesenti, must be found to be swamp in character and available for disposition under the grant before legal title passes, and that the Secretary or his delegate has jurisdiction to decide the eligibility of land for the swamp land grant. Having such jurisdiction, his judgment, even though erroneous, is valid and binding until set aside.

Rights, whether constituting equitable title or based upon a statutory preference, can be and are lost by acquiescence in an erroneous decision for a lengthy period of time, whether the error is one of law or fact, or stems from erroneous public records. The intervention of an adverse right inhibits the Department from reconsidering its past error, despite the fact that the land is still within the public domain.

None of the cases cited by Judge Stuebing's dissent deals with a situation where the State had applied for a patent, was denied one, and failed to appeal. Furthermore, most of them arose in California and were considered under section 4 of the Act of July 23, 1866, 43 U.S.C. § 987 (1974), which directed the Secretary to issue patents for all California swamp lands without regard to anything else that might have transpired. See Work v. United States, 23 F.2d 136, 137 (App. D.C. 1927). The special circumstances leading to the passage of the 1866 Act are set out in Tubbs v. Wilhoit, 138 U.S. 134, 137-139 (1891).

[3] The only remaining question is whether a Class II color of title claim is such an adverse right. The Department has stated that what constitutes an "adverse right" depends upon the circumstances of each case. It has held claims arising under the Color of Title Act, supra, where bona fide and substantial rights thereunder exist, to be "valid existing rights" within the savings clause of the withdrawal imposed by Executive Order of November 26, 1934. Secretary's Opinion, 55 I.D. 205, 210-211 (1935). Here the color of title is opposed to the State, not the United States, since if it were not present, the swamp land grant could be allowed, so that the United States in any event would dispose of the land. The color of title claim originated in the act of the state itself, and the appellant derives his title from the state's action. He or his predecessors have held the land for over 70 years and there is not the slightest hint of bad faith. In these circumstances, I find that Hunt's color of title claim is an adverse right, which, if valid, should be allowed and the state's application rejected. Accordingly, the State Office's decision is set aside and the case remanded for adjudication of appellants' offer. If it is found valid, the State's offer should be rejected; if it is not, the State's application would be ripe for adjudication.

Therefore pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the

decision of the State Office is set aside and the case remanded for further proceedings consistent herewith.

Martin Ritvo
Administrative Judge

We concur:

Newton Frishberg
Chief Administrative Judge

Joan B. Thompson
Administrative Judge

Anne Poindexter Lewis
Administrative Judge

Frederick Fishman
Administrative Judge

On the date of enactment of the Swamp and Overflowed Land Grants of 1849 and 1850, respectively, the land in question was of the character described by those statutes and was legally open and available for such disposition by the Congress to the State of Louisiana. Thus, there was no impediment to the operation of the statutes, and title vested immediately in the State as a grant in praesenti. Having so vested, the land office could not subsequently divest the State of its title by writing an erroneous decision to the effect that the land was not available and did not vest in the State, nor was the State obliged to appeal such decision on pain of losing that which it had already gained.

The vice in the majority opinion is exemplified in the following two sentences therefrom:

[2] When the Department has made a determination that for some reason title did not pass, its decision is of some consequence. Whether it was right or wrong, it denied the State's claim and left the land in question in the public domain.
* * *

The land was not "left in the public domain." It had already passed out of the public domain. The majority treat a grant in

praesenti as a grant in futuro. There is no way to reconcile that a grant which legally vested in praesenti in the State in 1849 by an Act of Congress was still available to be "left in the public domain" by an erroneous administrative decision in 1853.

The author is the owner of land through a chain of title which originated with a patent from the United States. Hypothetically, if the Bureau of Land Management now or subsequently were to issue a decision erroneously declaring that my land is still public domain, would my only choices be to either accept the decision as final and be divested of my title, or else avail myself of the Department's appellate procedures and successfully prove that the decision was wrong in order to preserve my title? Of course not. Secure in my knowledge that my title is good I could elect to disregard the decision as a matter of no consequence, and my failure to appeal would not diminish my entitlement at all. This is because the Department of the Interior has no jurisdiction or authority to revoke vested interests in real property by administrative fiat, particularly when such a determination is demonstrably wrong. Property interests are protected from such a result by the Constitutional guarantee of due process.

The swamp land acts of 1849 and 1850 each provide that swamp lands "shall be, and the same are hereby, granted to" certain states. The Supreme Court has frequently characterized the various swamp

land grants as in praesenti grants; that is, all lands within the border of the particular state which were swamp in character on the date of the act were granted to the state on that date. See, e.g., Michigan Land and Lumber Co. v. Rust, supra at 591, and United States v. O'Donnell, 303 U.S. 501, 509 (1938). It is true that so long as legal title to the land remains in the United States, the Department of the Interior may inquire into the character of the land. Michigan Land and Lumber Co. v. Rust, supra at 593. This does not mean that the Department may then divest a state of its equitable title to the swamp land. The only determination to be made is whether the land was swamp land as of the date of the applicable act. If the land was swamp in character, then equitable title passed as of the date of the act and may not be divested by a later act of Congress, United States v. Minnesota, 270 U.S. 181 (1926), and, a fortiori, may not be divested by this Department. In United States v. Minnesota, supra, land had been patented to the state under the swamp land grants, even though the land, at the time of the patent, was within the boundaries of lands ceded to Indians by treaty. However, most of the land patented as swamp land was not part of an Indian reservation on the date of enactment of the swamp land grants. Later inclusion of the lands in such a reservation could not divest the state of equitable title that it had received as of the date of the grant.

In the present case title had vested in the State of Louisiana with the enactment of the granting statute. The application for

patent was rejected thereafter due to a clerical error in the land office tract book. Such a mistake could not divest the state's equitable title to the land. As the Department stated in State of Louisiana v. State Exploration Co., 73 I.D. 148, 158 (1966):

"The identification of the lands and the transfer of legal title were mere matters of administration, which could not either enlarge or diminish the grant."

The views of the Supreme Court are nearly identical:

It is plain that the difficulty of identifying the swamp and overflowed lands could not defeat or impair the effect of the granting clause, by whomsoever such identification was required to be made. When identified, the title would become perfect as of the date of the act, The patent would be evidence of such identification and declaratory of the title conveyed. It would establish definitely the extent and boundaries of the swamp and overflowed lands in any township, and thus render it unnecessary to resort to oral evidence on that subject. It would settle what otherwise might always be a mooted point, whether the greater part of any legal subdivision was so wet and unfit for cultivation as to carry the whole subdivision into the list. The determination of the Secretary upon these matters, as shown by the patent, would be conclusive as against any collateral attacks, he being the officer to whose supervision and control the matter is especially confided. The patent would thus be an invaluable muniment of title and a source of quiet and peace to its possessor. But the right of the state under the first section would not be enlarged by the action of the Secretary, except as to land, not swamp or overflowed, contained in a legal subdivision, as mentioned in the fourth section; nor could it be defeated, in regard to the swamp and overflowed lands, by his refusal to have the required list made out, or the patent issued, notwithstanding the delays and embarrassments which might ensue. [Emphasis added.]

Wright v. Roseberry, 121 U.S. 488, 500-501 (1887).

It is clear from a reading of Wright and other cases that equitable title to the land is vested in the State of Louisiana in this case, and thus the land is not public land within the meaning of the Color of Title Act, 43 U.S.C. § 1068 (1970). Therefore, appellants' application to purchase ought to be rejected.

There remains the question of whether the doctrine of res judicata or its administrative counterpart, the doctrine of administrative finality, should be applied in this case. The pronouncements of general rules by both the courts and this Department with respect to the applicability of res judicata seem to present a study in inconsistency. For example, in Ben Cohen, 21 IBLA 330 (1975), the Board stated:

In the absence of compelling legal or equitable reasons for reconsideration, the principle of res judicata, and its counterpart, finality of administrative action, will operate to bar consideration of a new appeal arising from a later proceeding involving the same claim and the same issues. See United States v. Blythe, 16 IBLA 94, 101 (1974); L. M. Perrin, Jr., 9 IBLA 370, 373 (1973); Elsie V. Farington, 9 IBLA 191, 194 (1973); Eldon L. Smith, 6 IBLA 310, 312 (1972); Gabbs Exploration Co., 67 I.D. 160, 165-66 (1960), aff'd Gabbs Exploration Co. v. Udall, 315 F.2d 37 (D.C. Cir.), cert. denied, 375 U.S. 822 (1963). * * *

21 IBLA at 331-32.

On the other hand, the Department stated in United States v. United States Borax Co., 58 I.D. 426, 430 (1943):

The Secretary of the Interior has a continuing duty as guardian of the public lands. He loses this power and his jurisdiction ends only when the Government no longer has legal title. Thus, in dealing with those who claim or apply for an interest in public land, so far as the Government is concerned the Secretary's decisions are not controlled by the principle of res judicata. His first duty is to see that the public domain is conserved, managed and disposed of in the manner Congress has directed. And while he has jurisdiction over the land, he may open any proceeding and correct or revise or reverse any decision of the Department or the General Land Office provided interested persons in appropriate cases have notice and opportunity to be heard. Before the passing of legal title, his findings and decisions are as completely subject to revision as are those of a court before final judgment or before the end of its term.

Moreover, as Davis notes in his treatise on administrative law, 2 K. Davis, Administrative Law Treatise, §§ 18.01 to 18.12 (1958, Supp. 1965), the courts likewise have seemed of mixed opinion. But the better view is that res judicata is appropriate in some circumstances. Those circumstances obtain when the conditions for determining rights in the administrative context closely parallel those in judicial proceedings. For example, in Pearson v. Williams, 202 U.S. 281 (1906), Justice Holmes seems to state that res judicata is not applicable to administrative determinations. But it is clear that he so held in that case because of the summary nature of the proceedings. In West v. Standard Oil Co., 278 U.S. 200 (1929), the

Supreme Court held that the Department had the authority to reopen proceedings at any time before the passage of title. An earlier Secretary of the Interior had determined that the land was not known to be mineral in character in 1903, the date of the survey. Consequently, the land would pass to the State of California and its grantees as a result of various school land grants. Notwithstanding the earlier determination, a later Secretary reopened the proceedings and reversed the findings. The Court affirmed the Department's later action in reopening the proceedings. The decision emphasized two things. First, the Secretary's duty as guardian of the public lands obliges him to see that none of the public domain is disposed of to those not entitled to receive it. Second, the earlier determination had not been based on a factual hearing but on a misapprehension of the law. The Court held that the pertinent facts had not been adduced at the first hearing.

Those two considerations are the same considerations the Department has relied on when refusing to apply the doctrine of *res judicata*. For example in Whitten v. Read, 53 I.D. 453 (1931), a very complex swamp land case, the Department stated in the syllabus at 454:

The rule of res judicata is not applicable to a decision by the Commissioner of the General Land Office holding that the land was not swampy in character when he had no facts before him other than the preliminary

showing by the State that the land was swamp and inured to the State under the [S]wamp [L]and [A]ct.

In United States v. Unites States Borax Co., supra, the Department went even further:

The principle of res judicata has no application to proceedings in the Department relating to disposition of the public domain until legal title passes, and findings and decisions are subject to revision in proper cases. Where an expert witness in a former proceeding subsequently changes his opinion on a material issue of fact, the determination of which is entirely dependent upon the reasoning of such experts, another hearing may be ordered.

58 I.D. at 426.

The case law of both the Supreme Court and this Department may be summarized as follows. While the doctrine of res judicata may be applicable in some instances, two principles will militate against its application. First, if there has been less than a complete exploration of all the relevant facts, the doctrine probably will not be applied. Second, the doctrine will not be applied where the land is about to pass from ownership by the United States to a private party. The Secretary's duty as guardian of the public lands obliges him to see that none of the public domain is passed to those not entitled to receive it. See e.g., Knight v. United States Land Ass'n., 142 U.S. 161, 181 (1891).

In the case at bar we note that the June 22, 1853, decision of the General Land Office was based on the assumption that the land in question had already been patented to another person. That assumption in turn was based upon a clerical error in the land office records. It is doubtful that the merely clerical nature of the decision rejecting Louisiana's swamp land selection should be characterized as an "adjudication." But even if it were to be dignified with such a characterization, it is nevertheless clear that the decision was summary in nature and based upon a misapprehension of the facts. Moreover, the State of Louisiana had no reason to believe that the official land office records were incorrect. As a result, there was no realistic opportunity for a full exposition of the relevant facts. For these reasons, the June 22, 1853, decision of the General Land Office is not *res judicata*.

Accordingly, I would hold that title to the land vested in the State as a grant in praesenti, that the 1853 decision of the land office was of no consequence, and that the 1975 decision of the Eastern States Office should be affirmed.

I further would suggest that this is a case in which the doctrine of after-acquired title may be applicable, as appellants' chain of title originates with a conveyance from the State. However,

appellants' avenues for recognition of their claim properly would lie in and to the State of Louisiana.

Edward W. Stuebing
Administrative Judge

I concur:

Douglas E. Henriques
Administrative Judge

ADMINISTRATIVE JUDGE GOSS DISSENTING:

In order to grant either the State or appellants the land, the Department must specifically or by implication set aside the Department action of June 22, 1853, which rejected the State application for patent for the erroneous reason that the land had previously been patented. Since the land remains in Federal ownership, the decision that it was patented should be set aside. The doctrine of res judicata - administrative finality cannot be applied.

For Louisiana's in praesenti right to be cut off, therefore, the State must be deemed to have (1) voluntarily waived its right or (2) be involuntarily estopped from asserting its claim.

The State of Louisiana refiled its swamp selection on November 20, 1973. Appellants filed January 8, 1974. Under 43 U.S.C. § 1068 (1970) the State claim should be adjudicated prior to any patent to appellant. The State Office should have consolidated the two cases, 1/ and first considered the rights of Louisiana against those of the United States.

1/ The State Office decision lists the number of the Louisiana claim, ES 15099, but does not show Louisiana as a party in its decision.

Here the in praesenti right of the State stands on a higher plane than a Class II color of title right, which is subject to the discretion of the Secretary pursuant to section 1068, supra. I do not believe that such a discretionary color of title right should be considered an intervening right sufficient to bar the State's claim. It was the error of the Department which originally caused the problem here, and any doctrine by which such error is used to deprive a state of its valuable rights should be very strictly construed.

It has not been shown that Louisiana had or should have had the sufficient knowledge of the true facts and sufficient intent to be charged with voluntary waiver of its rights. As to whether Louisiana waived its unknown interest when it made a tax sale to appellants' predecessors, it appears Louisiana has followed the doctrine that a tax sale is intended to pass and does pass only the interest of the delinquent taxpayer. In the 1964 decision Kallenberg v. Klause, 162 So.2d 73 (La. 4th Cir. 1964), writ ref. 246 La. 356, 164 So.2d 354, the Court discussed the then Louisiana law at 162 So.2d 75:

The interest conveyed at a tax sale for delinquent state taxes by a tax collector is only that owned by the delinquent taxpayer. LSA-Revised Statutes, § 47:2183-§ 47:2184.

* * * The adjudication for delinquent taxes to a tax purchaser by a sheriff under LSA-Revised Statutes, § 47:2183, is distinguished from an express adjudication to the State, in that the State is not invested with title to the involved property and, therefore, cannot and does not itself grant title thereto. It possesses only a lien and privilege on the property to secure payment of its delinquent taxes and, in the enforcement of that security can, pursuant to legislative authority, cause the sale of the property. *Dyer v. Wilson*, La.App., 190 So. 851.

In the case herein, apparently the State's sale passed no interest to appellants' predecessors; hence there would be no State waiver by virtue of the sale. It is not clear from the record whether appellants' chain of title permits them to claim color of title for any greater interest than that which passed at the tax sale. Appellants should be given the opportunity to present any further analysis of Louisiana law.

For both voluntary waiver and for an involuntary estoppel, Louisiana and appellants are in the same position as to constructive knowledge and whether they should have looked behind the tract book. There can be no legally cognizable reliance by appellants and their predecessors; here appellants' predecessors, the State and the Department all had the same means of determining the condition of the title. See Oklahoma v. Texas, 268 U.S. 252, 257-58 (1925). The State cannot be charged with waiver of an unknown right, especially where the State was misled by the United States.

This concept was discussed in Hunter v. Baker Motor Vehicle Co., 225 F. 1006, 1013 (N.D. N.Y. 1915):

This plaintiff waived nothing, as the doctrine of waiver rests on full knowledge of the facts. 7 Am. & Eng. Encyclopedia of Law, p. 155, citing several cases. It is there said:

"Waiver implies knowledge, and one cannot be held to have forfeited any rights by reason of acts done in ignorance of the extent of those rights. [2/] Thus, if workmanship contracted for has been inadequately performed, one who accepts it in ignorance of the deficiency does not waive his right to insist upon the defect. So, too, if he has been put off his guard or misled by the conduct of the other party, a waiver induced by such deception will not be charged against him." [Emphasis added.]

Neither is Louisiana barred by estoppel through acquiescence or waiver. Appellants cannot be deemed to have relied because of the constructive knowledge discussed supra. Further, the State has been guilty of no gross negligence; under Crary v. Dye, 208 U.S. 515, 521 (1908), there can be no estoppel, particularly since rights to real property are involved:

The principal of estoppel is well settled. It precludes a person from denying what he has said or the implication from his silence or conduct upon which another has acted. There must, however, be some intended deception in the conduct or declarations,

 2/ Accord, Himmelfarb v. United States, 175 F.2d 924 (9th cir. 1949); United States v. Johnson, 23 IBLA 349, 356 (1976).

or such gross negligence as to amount to constructive fraud. Brant v. Virginia Coal & Iron Co., 93 U.S. 326 [1876]; Hobbs v. McLean, 117 U.S. 567 [1886]. And in respect to the title of real property the party claiming to have been influenced by the conduct or declarations must have not only been destitute of knowledge of the true state of the title, but also of any convenient and available means of acquiring knowledge. Where the condition of the title is known to both parties, or both have the same means of ascertaining the truth, there can be no estoppel. Brant v. Virginia Coal & Iron Co., supra. These principles are expressed and illustrated by cases in the various text books upon equitable rights and remedies. * * *

It is clear that the conduct of Louisiana herein does not approach that referred to in Crary.

Rather than the State, it could be argued that the United States is estopped to deny relief to Louisiana. See, e.g., In the Matter of Petitions for Naturalization of 68 Filipino War Veterans, 406 F. Supp. 931 (N.D. Cal. 1975). The misrepresentation herein, although innocent, was made not by the State but by the Department with a special constructive knowledge of its error. See Zielinsky v. Philadelphia Piers, Inc., 139 F. Supp. 408 (E. D. Penn. 1956). It will be noted that the provisions of 43 CFR 1810.3 would be inapplicable to this case, for Louisiana (unless it is estopped) has a statutory right to the property.

Louisiana filed its application prior to that of appellants, an additional element of priority.

In addition to the above, the facts of this case can be distinguished from those cited by the majority. For example, Class II color of title rights are less than those of an entryman. In Leutholtz v. Hotchkiss, supra -- the California Court of Appeal's decision on which the Department based State of New Mexico, supra -- the acquiescence was with full knowledge of the facts involved and the subsequent United States permittee had expended \$70,000 in drilling an oil well.

I submit that to carry out the mandate of Congress as expressed in the Swamp Lands Act, the State Office should be affirmed and appellants' color of title application should be denied, subject to evaluation by the State Office of any submissions regarding waiver and the law of Louisiana tax sales. Such submissions could be reviewed by the State Office as part of its adjudication of the State claim, ES 15099.

It may be that appellants must seek their remedy pursuant to any Louisiana equitable relief statutes.

Joseph W. Goss
Administrative Judge