

JUNIOR L. DENNIS

IBLA 78-402

Decided March 9, 1979

Appeal from a decision of the Oregon State Office, Bureau of Land Management, rejecting mining claim notice of location, OR MC 2385, and declaring the mining claim null and void ab initio.

Affirmed as modified.

1. Administrative Authority: Generally--Administrative Practice--Statutory Construction: Generally

Subsequent to the passage of the Federal Land Policy and Management Act of 1976 (FLPMA), the Department lacked the authority to accept donations of land under the Act of July 14, 1960, which had been expressly repealed by FLPMA. Inasmuch as the actions of the Secretary under the Act of July 14, 1960, were not ministerial, the doctrine of relation cannot be used to validate, on a nunc pro tunc basis, an acceptance of a donation under the authority of the Act of July 14, 1960, occurring after the repeal of that Act by Congress.

2. Mining Claims: Lands Subject to

A mining claim located on lands not then in Federal ownership is null and void ab initio.

APPEARANCES: David F. Lentz, Esq., Eugene, Oregon, for appellant; Robert H. Memovich, Esq., Office of the Solicitor, for the Government.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

Junior L. Dennis has appealed from a decision of the Oregon State Office, Bureau of Land Management (BLM), dated April 4, 1978, rejecting his notice of location, OR MC 2385, for a lode mining claim identified as the Hard Times, and declaring the claim null and void ab initio.

Appellant's mining claim was located on May 28, 1977, in Douglas County, Oregon, and filed for recordation with the BLM State Office on August 26, 1977. The land embraced by the claim had been patented and later reconveyed to the United States on September 2, 1976, as a gift, pursuant to the Act of July 14, 1960, 43 U.S.C. § 1364 (1970), repealed, Federal Land Policy and Management Act of 1976 (FLPMA), 90 Stat. 2793.

The BLM State Office rejected appellant's mining claim notice of location because the claim was "not located on 'Federal lands' as defined in * * * 43 CFR 3833.0-5(f)." We agree that the notice of location should have been rejected, but affirm on different grounds.

[1] The essential problem with this case is that both BLM and appellant have been proceeding on an assumption that the land upon which the mining claim was located was owned by the United States at the time of the location of the subject claim. In point of fact, it was not.

On September 2, 1976, Morris F. Shipley and Jessie B. Shipley signed a deed conveying the lands in issue to the United States, under the Act of July 14, 1960, 74 Stat. 506, 43 U.S.C. § 1364 (1970). The following notation appears upon the face of the deed: "Accepted subject to approval of title by the Department of Justice: /s/ George C. Francis, District Manager."

On September 22, 1976, the Office of the Regional Solicitor provided the State Office with a preliminary opinion of title, which stated, inter alia, "when the objections and requirements noted in the Schedule A have been met, the original deed to the United States, properly executed, has been recorded, and a title policy in approved form has been obtained showing the vesting of a valid title in the United States of America, the title will be approved subject to those rights which have been administratively determined to be acceptable." (Emphasis supplied.)

On October 1, 1976, the deed was recorded in Douglas County, Oregon.

On October 6, 1976, a Certificate of Inspection and Possession was completed by a BLM realty specialist which states that a personal examination and inspection of the subject land "over which a Deed is being acquired by the United States of America" was made by affiant. (Emphasis supplied.)

On October 21, 1976, Congress enacted the Federal Land Policy and Management Act of 1976, 90 Stat. 1744, which repealed the Act of July 14, 1960, as it relates to donations of land. See section 705(a), 90 Stat. 2793.

On November 30, 1976, the Office of the Regional Solicitor provided BLM with a final opinion of title. That document states: "[T]he title evidence and accompanying data disclose valid title to be vested in the United States of America subject to rights and easements noted in Schedule A attached hereto * * *." (Emphasis supplied.)

On May 28, 1977, the subject mining claim was located on the parcel. Recordation papers were filed on August 26, 1977. By decision of April 4, 1978, the mining claim recordation was rejected and the mining claim was declared null and void ab initio.

By decision dated June 28, 1978, the Chief, Branch of Lands and Minerals Operations, Oregon State Office, BLM, declared:

Title to the land offered to the United States as a gift pursuant to section 103(a) of the Public Land Administration Act of July 14, 1960 * * * has been found to be satisfactory and acceptance of this land is in accord with the program set forth in regulation 43 CFR 2110.0-1. Therefore title to the offered lands, as described below is hereby accepted. [Emphasis supplied.]

A review of the applicable regulations against this factual panorama immediately reveals certain problems. Thus, 43 CFR 2111.4 clearly states: "Upon acceptance of the deed of conveyance, the lands or interests so conveyed will become property of the United States." The deed of conveyance was purportedly accepted twice; once by the district manager and then by the decision of June 28, 1978. The acceptance by the district manager, however, was beyond his authority. BLM Order No. 701, section 1.3(b)(1), authorizes the State Director to accept donations of lands under the Public Land Administration Act of July 14, 1960. Section 1.1(a) provides that the State Director may redelegate this authority, but that such re delegation "must be approved by the Director, Bureau of Land Management, and published in the FEDERAL REGISTER." As was noted in a memorandum, dated October 13, 1977, from the Chief, Branch of Lands and Minerals Operations, Oregon State Office, to the District Manager, Medford, "authority to accept the deed of conveyance of land pursuant to Section 103(a) of the Act of July 14, 1960, has not been redelegated to the District Manager." (Emphasis supplied.)

Moreover, the BLM Manual clearly provides that the adjudication officer, not the classification officer (herein, the district manager) has the authority to accept title. See generally BLM Manual 2110. Inasmuch as the district manager was without authority to accept the donation of land, his actions must be treated as a nullity. Cf. Nola Grace Ptasynski, 28 IBLA 256 (1976).

Acceptance of the donation as of June 28, 1978, is fraught with a different problem. The act under which the State Office had purported to act had already been repealed by FLPMA. Section 205(c) of FLPMA provides that lands acquired through donation "shall, upon acceptance of title, become public lands, and, for the administration of public land laws not repealed by this Act, shall remain public lands." Thus, the provisions of 43 CFR 2111.4, which provide that the land acquired under the 1960 Act are not subject to applicable land laws "unless and until an order to that effect is issued by the authorized officer," may no longer obtain.

In a memorandum to the Oregon State Director, BLM, dated June 6, 1978, the Acting Assistant Regional Solicitor advanced a number of differing theories as to why the donation could be deemed to have been consummated under the Act of July 14, 1960. We will review these arguments seriatim.

First, he adverts to the savings clause of FLPMA and contends that the donors had a vested right which survived the repeal of the 1960 Act, such right being the "completion of the transaction in accordance with the authority under which it was initiated and effectively completed." We find it impossible to accept this argument. It is premised on an interpretation of the 1960 law that effectively states that the Secretary had no discretion to reject donated lands. Such was not the case, as is made clear by 43 CFR 2110.0-1, which expressly stated that "the authority of the Secretary is discretionary and acceptance of offers rests, among other things, upon a determination that the public interest will be served thereby." The mere fact that a person is desirous of making a gift to the United States, rather than attempting to acquire a right against the United States, does not make Secretarial actions ministerial.

Second, the memorandum contends that subsequent actions of the State Office, occurring after the district manager's unauthorized acceptance can be seen as ratifying his acceptance. Even were this the case, the BLM Manual makes it clear that such ratification could only have occurred after the repeal of the 1960 Act. Thus, the BLM Manual provides: "On completion of the supplemental examination, the file will be submitted to the Field Solicitor for determination as to whether title will be properly vested in the United States. Upon the determination of the Field Solicitor that title is satisfactory, the adjudication officer will transmit a letter of acceptance of title to the donor. BLM Manual 2110.12J. (See Illustration 3)." (Emphasis supplied.) It is interesting to note that the illustration referred to states: "By this acceptance, the lands become the property of the United States." In any event, inasmuch as the final opinion of title was not rendered until November 30, 1976, over a month after the enactment of FLPMA, the State Office was not possessed of any authority under the 1960 Act to ratify the acceptance by the district manager.

Third, the Solicitor argues that the doctrine of relation would be applicable here. While it is certainly true that the doctrine of relation would, if applicable, serve to vitiate the problems herein delineated, application of the doctrine is impossible. The utilization of the legal fiction of relation back would be justified if either the Department had the authority, subsequent to the enactment of FLPMA, to accept donations of land under the Act of July 14, 1960, which it did not, or, alternatively, if the Department's actions were ministerial, which they were not.

Thus, we reach the conclusion that the offer of land was not accepted until June 28, 1978, and that such acceptance could only have occurred under section 205 of FLPMA. This being the case, the provisions of section 205(c) apply.

[2] In view of the above analysis, it is clear that appellant's claim was located on land which was not, at the time of location, in Federal ownership. The State Office thus correctly rejected recordation of the Hard Times claim and declared that claim null and void ab initio. See Floyd G. Brown, 35 IBLA 110 (1978); Ray L. Virg-in, 33 IBLA 354 (1978).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed as modified.

James L. Burski
Administrative Judge

ADMINISTRATIVE JUDGE FISHMAN CONCURRING:

The intriguing question raised by the case is whether a deed to the United States, not properly accepted prior to the repeal of the statute under which given, may gain vitality by a later acceptance under the concept of relation (sometimes called "relation back").

The Office of the Regional Solicitor, Portland, Oregon, in its memo of June 6, 1978, answers the query in the affirmative relying upon a quotation from Gibson v. Chouteau, 80 U.S. (13 Wall.) 92, 100-101 (1871). But a more complete quotation at pages 100-102 puts the proper focus upon the case, showing that the doctrine of relation does not apply to anybody other than "persons who stand in some privity with the party that initiated the proceedings for the land, and acquired the equitable claim or right to the title." Id. at 101.

Gibson at 100-102 states in pertinent portion:

By the doctrine of relation is meant that principle by which an act done at one time is considered by a fiction of law to have been done at some antecedent period. It is usually applied where several proceedings are essential to complete a particular transaction, such as a conveyance or deed. The last proceeding which consummates the conveyance is held for certain purposes to take effect by relation as of the day when the first proceeding was had. Thus, in the present case, the patent, which was issued in 1862, is said to take effect by relation at the time when the survey and plat of the location, made in 1818, were returned to the recorder of land titles under the act of Congress. At that time the title of the claimant to the land desired by him had its inception, and so far as it is necessary to protect his rights to the land, and the rights of parties deriving their interests from him, the patent is held to take effect by relation as of that date. *

The Supreme Court of Missouri, considering that by this doctrine of relation, the legal title, when it passed out of the United States by the patent, instantly dropped back in time to the location of the first act or inception of the conveyance, and vested the title in the owner of the equity as of that date, held that the statute intercepted the title as it passed through the intermediate conveyances from that period to the patentee. "The legal title," said the court, "in making this circuit, necessarily runs around

* Lessieur v. Price, 12 Howard, 74.

the period of the statute bar, and the action founded upon this new right is met by the statute on its way, and cut off with that which existed before."*

The error of the learned court consisted in overlooking the fact that the doctrine of relation is a fiction of law adopted by the courts solely for the purposes of justice, and is only applied for the security and protection of persons who stand in privity with the party that initiated proceedings for the land, and acquired the equitable claim or right to the title. ** The defendants in this case were strangers to that party and to his equitable claim, or equitable title, as it is termed, not connecting themselves with it by any valid transfer from the original or any subsequent holder. The statute of limitations of Missouri did not operate to convey that claim or equitable title to them. It only extinguished the right to maintain the action of ejectment founded thereon, under the practice of the State. It left the right of entry upon the legal title subsequently acquired by the patent wholly unaffected. [Emphasis supplied.]

* Gibson v. Chouteaus's Heirs, 39 Missouri, 588.

** Lynch v. Bernal, 9 Wallace, 315; Jackson v. Bard, 4 Johnson, 230.

In the case at bar, no privity has been asserted between the Shipley's and appellant. It follows that the doctrine of relation does not apply.

Moreover, as the majority opinion indicates, the repeal of the Act of July 14, 1960, 43 U.S.C. § 1364 (1970), by the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C.A. § 1701 et seq. (West Supp. 1978), precluded the application of the doctrine of relation. In essence, it is my position that the second step, designed to trigger the doctrine, must either have legal authority therefor, or alternatively consist of a purely ministerial act.

In George J. Propp, 56 I.D. 347 (1938), the Department recognized these principles. It held that (1) the Taylor Grazing Act, 43 U.S.C. § 315 et seq., (1970), impliedly repealed the Stock-Raising Homestead Act of December 29, 1916, 43 U.S.C. §§ 291-300 (1970); (2) the repeal does no prejudice to the rights of any applicant citizens having any vested interest in a statute or a Government policy; (3) a stock-raising homestead application to enter undesignated lands initiates in an applicant no present rights but only prospect of future rights of uncertain existence and remains incomplete until susceptible of allowance; (4) the Department is without jurisdiction to designate

as of stock-raising character land withdrawn from entry by competent authority, and (5) a single failure to observe the rule neither changes nor vitiates it. Thus Propp suggests that designation of lands is proper, despite the fact that the statute authorizing such designation had been repealed impliedly. However, since Propp found that the lands applied for could not be designated under the Stock-Raising Homestead Act because they were withdrawn by the order of November 26, 1934, it may be argued that Propp did not reach the issue at bar here. Alternatively it may be argued that if a withdrawal, which may now be revoked by the Secretary under delegated authority from the President, is sufficient to bar the doctrine of relation, a fortiori, a repeal of an authorizing statute must also be deemed to preclude application of that doctrine.

Although Masonic Homes of California, 4 IBLA 23, 78 I.D. 312 (1971), does not mention the doctrine of relation, it may be cited for the principle that the doctrine cannot apply where the operative statute has been repealed. In Masonic, Hamilton deeded land to the United States in 1901 as a basis for a lieu selection, as was then permitted by the Forest Exchange Act of June 4, 1897, 30 Stat. 11, 36. In 1937, his lieu selection applications were denied. The Act of July 6, 1960, 74 Stat. 334, inter alia, repealed the Act of April 28, 1930, 46 Stat. 257; 43 U.S.C. § 872 (1970). Hamilton's successor in interest in the late sixties applied for a quitclaim deed under the 1930 Act for the lands conveyed to the United States in 1901. Prior to 1960, the Government had "returned his [Hamilton's] deed and other papers" to the appellant which the latter viewed as "tantamount to a reconveyance." 78 I.D. at 316. Masonic clearly suggests that a quitclaim could not be given, after the repeal of the 1930 Act, to relate back to the time of the return of the deed and accompanying papers.

Frederick Fishman
Administrative Judge

ADMINISTRATIVE JUDGE THOMPSON CONCURRING IN RESULT:

The question raised by this appeal is whether the mining claim should be declared null and void ab initio because it was located on land not open to location of the mining laws. Appellant has not shown under any acceptable theory how the land could be considered open to the mining laws when its claim was located. For this reason I concur in the affirmance of the BLM decision. Under the theories adopted by BLM and advanced by the Regional Solicitor, the land would not be open to entry without an opening order regardless of when we determine acceptance of the gift was made and when title vested in the United States. Under the rationale of Judges Burski and Fishman, title to the land was not in the United States when the claim was located and thus the claim was void when located. Under either of these positions the claim is a nullity. I do not believe it is necessary for this decision to decide all the facets relating to the land status caused by the deed giving the land to the United States, and therefore, concur in the result. I note that there has been no determination made here whether the land has ever become subject to the mining laws.

Joan B. Thompson
Administrative Judge

