

J. BURTON TUTTLE

IBLA 80-231

Decided August 18, 1980

Appeal from decision of the Wyoming State Office, Bureau of Land Management, rejecting offer to purchase lands. W 31177.

Reversed and remanded.

1. Federal Land Policy and Management Act of 1976: Rules and Regulations--Federal Land Policy and Management Act of 1976: Sales--Public Sales: Preference Rights--Regulations: Interpretation

An assertion of a preference right to purchase public land offered for public sale pursuant to the Unintentional Trespass Act of Sept. 26, 1968, 82 Stat. 870 (43 U.S.C. §§ 1431 1435 (1976)) (now covered by the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701, 1722 (1976)), is improperly rejected when the applicant submits satisfactory equitable proof of his "ownership" of contiguous lands by showing that he has contracted to purchase such land, has made at least partial payment therefor, and is in possession thereof.

Robert A. Davidson, 13 IBLA 368 (1973), overruled to the extent it is inconsistent.

APPEARANCES: J. Burton Tuttle, pro se.

OPINION BY ADMINISTRATIVE JUDGE FISHMAN

This appeal is taken from a decision dated November 26, 1979, by the Wyoming State Office, Bureau of Land Management (BLM), rejecting appellant's offer to purchase the following described lands: lot 2, sec. 4, T. 18 N., R. 88 W., sixth principal meridian, Wyoming.

The tract was offered for sale pursuant to the Unintentional Trespass Act (UTA) of September 26, 1968, 43 U.S.C. §§ 1431 1435 (1976). UTA authorized the Secretary of the Interior to sell at public auction a tract of public land where such land was not needed for public purposes and upon which there was an unintentional trespass on or before September 26, 1968. It also accorded owners of contiguous lands a preference right to buy such land. Section 214 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701, 1722 (1976), carried forth the objectives of the Act of September 26, 1968, as follows:

(a) Preference right of contiguous landowners; offering price

Notwithstanding the provisions of the Act of September 26, 1968, [43 U.S.C. §§ 1431 35 (1976)] hereinafter called the "1968 Act", with respect to applications under the 1968 Act which were pending before the Secretary as of the effective date of this subsection and which he approves for sale under the criteria prescribed by the 1968 Act, he shall give the right of first refusal to those having a preference right under section 2 of the

1968 Act * * *. The Secretary shall offer such lands to such preference right holders at their fair market value (exclusive of any values added to the land by such holders and their predecessors in interest) as determined by the Secretary as of September 26, 1973.

Appellant herein asserted a preference right to purchase the tract in question. The governing regulation, 43 CFR 2711.4(b)(2), states:

(2) Each preference-right applicant must, within the time specified by the authorized officer, or such extensions of time as he may grant, submit proof of ownership of the whole title to the contiguous lands, that is, he must show that he had the whole title in fee on the last day of the 30-day period. The authorized officer will specify that date. Such proof must consist of (i) a certificate of the local recorder of deeds, or (ii) an abstract of title or a certificate of title prepared and certified by a title company or by an abstracting company, or by a duly qualified attorney authorized to practice in the State stating on the basis of an examination of title records that the applicant owned adjoining land in fee simple on the last day of the 30-day period. If the preference-right applicant does not own adjoining land at the close of the preference-right period, his preference-right claim will be lost. After a case has been closed, the data filed pursuant to this section may be returned by the authorized officer. [Emphasis added.]

The decision appealed from rejected appellant's application as follows:

Proof of ownership filed by J. Burton Tuttle established the fact that he owns equitable title to contiguous lands, however he is not the landowner of record of any lands contiguous to the parcel of public land being offered for sale. * * *

The acceptance of offer of sale submitted by J. Burton Tuttle must therefore be and is hereby rejected because he does not qualify as a preference right holder as defined by * * * 43 CFR 2711.4.

The decision does not elaborate how appellant's asserted preference right status failed to conform with the regulation. The record, however, contains a land sale contract, dated December 11, 1974, by which James A. and Mary Helen Chapman agreed to sell to appellant herein certain lands including those upon which appellant bases his preference right status. The agreement incorporates a general warranty deed and lists a total purchase price of \$645,325, part of which was payable in five annual installments beginning on December 11, 1975. In the event of breach of the buyer, the agreement accorded the seller the right to retain all money theretofore paid, and the right to reenter the lands, dispossessing the buyer.

On May 2, 1979, BLM published a notice requiring adjoining owners "claiming any right, title, or interest in * * * [the land in issue to] notify * * * [BLM] within forty-five (45) days, from the date of this notice."

On May 11, 1979, appellant filed with BLM an acceptance of offer of sale, including a statement by a duly qualified attorney authorized to practice in the state that he was the owner in fee simple of lands contiguous to the parcel being offered for sale. See 43 CFR 2711.4(b). On May 25, 1979, the city of Rawlins, Wyoming, also filed

an acceptance asserting ownership of contiguous lands. ^{1/} On July 9 BLM requested the county clerk of Carbon County, to verify that appellant owned contiguous lands. The county clerk's response filed on July 26 reads: "Our last title of record shows that the above described land is listed in the name of James and Helen Chapman." BLM then telephoned appellant and was made aware of his contract to purchase lands from the Chapmans.

It is for these reasons that BLM rejected the appellant's acceptance of the offer to sell.

In his statement of reasons appellant asserts that the term "whole title" in the regulation was meant to exclude lessees, remainderman, or life tenants from the status of preference right holders. Appellant also cites authorities for his position that the term "fee simple" has never been used to distinguish between legal and equitable estates, that equitable estates, are to all intents and purposes, legal estates.

[1] In Robert A. Davidson, 13 IBLA 368, 370 (1973), the appellant similarly claimed preference right status by virtue of a land sale contract on which only a small fraction of the purchase price

^{1/} The documents filed by the city of Rawlins on May 25, 1979, described the land in issue as "contiguous" land owned by the city. On June 19, 1979, BLM asked the city to properly execute its proof of preference right and file it by June 25, 1979. The city did so on June 26, 1979.

remained to be paid. The county clerk and recorder there certified to BLM that the seller of the contiguous lands in question was the sole owner in fee simple. Addressing 43 CFR 2711.4(b)(2) the Board stated:

The regulation was worded as set forth above so that the personnel in the State Office will not be required to construe and rule upon claims of title and contracts of sale. It is clear that the certificate of the local recorder of deeds, naming * * * [the seller] as the owner of the contiguous land in issue, is insufficient.

In Dudley S. Long, 16 IBLA 18 (1974), purchasers under a land sale contract asserted a preference right with the permission of the vendors of the contiguous lands. The Board held that the purchasers' status was inadequate to establish such preference right.

At first blush, Davidson seems to be dispositive of this case. However, our further study of the basic issue delineated here impels us to a contrary conclusion.

In Carter Blatchford, 53 I.D. 613 (1932), the Department held that a purchaser in possession under a contract to purchase is an owner within the contemplation of section 3 of the Act of February 27, 1925, (43 Stat. 1013), relating to the division of erroneously meandered lands in Wisconsin among the owners of adjoining and surrounding tracts, stating:

A purchaser in possession by a contract to sell has the equitable title, the vendor having the mere right to retain

the legal title as security for any unpaid balance of the agreed purchase price. See Williams v. United States (138 U.S. 514, 516); Boone v. Chiles (10 Pet. 177, 224). [53 I.D. at 614.]

In Roberts v. Osburn, 2 Kan. 90, 589 P.2d 985, 991 (1979), the court stated as follows:

"The intention of the parties is the factor in any proper decision. Parties do not frequently make express provisions as to risk, but they do indicate whether they intend a present transfer of the rights of ownership or a future transfer, and there should be no doubt that they expect all the incidents of ownership to pass from the seller to the buyer at that time. That time will frequently not be when the legal title is transferred. If, as frequently happens, a purchaser is given immediate possession under his contract, with the right to use the property as his own to the same extent as is customary with a mortgagor, the title is retained merely as security for payment of the price. It is a short way and in many states a common way of accomplishing the same end that would be achieved by conveying to the purchaser and taking back a mortgage. When by the contract the beneficial incidents of ownership are to pass is the time which the parties must regard as the moment of transfer. This is the time when the purchaser is held to become the "owner," under alienation clauses in insurance policies, and no little authority supports the conclusion that then, and not before, the risk passes to the vendee." Torluemke, 174 Kan. at 671, 258 P.2d at 284. [Emphasis supplied.] [Citing Williston on Contracts.]

There are several cases from other jurisdictions that distinguish between equitable and legal ownership. In County of Los Angeles v. Butcher, 155 Cal.App.2d 744, 318 P.2d 838 (1957), it was said:

"From the foregoing authorities it is clear that where parties enter into a written contract for the purchase and sale of real property pursuant to which the buyer goes into possession and the seller retains the legal title as security for the purchase price, the latter "has no greater rights than he would possess if he had conveyed the land and taken back a mortgage" and the

purchaser "is for all purposes the owner." [Citations omitted.]" p. 747, 318 P.2d p. 840.

In Hartman v. Hartman, 11 Ill.App.3d 524, 297 N.E.2d 199 (1973), the same principle was announced and followed when the court said:

"Under the doctrine of equitable conversion upon the execution of a valid, enforceable contract for the sale of realty, the purchaser becomes the equitable owner of the realty holding the purchase money as trustee for the seller. The seller becomes trustee of the legal title for the purchaser with a lien on the land as security for the purchase money." pp. 527 528, 297 N.E.2d p. 202.

A few of the cases from other jurisdictions where this concept has been applied include: Davis v. Rio Rancho Estates, Inc., 401 F.Supp. 1045 (S.D.N.Y. 1975); United States v. Giwosky, 349 F.Supp. 1200 (E.D. Wis. 1972); Shreeve v. Greer, 65 Ariz. 35, 173 P.2d 641 (1946); Trickey v. Zumwalt, 83 N.M. 278, 491 P.2d 166 (1971); Reynolds Aluminum v. Multnomah Co., 206 Or. 602, 287 P.2d 921 (1955); Jakober v. Loew's Theatre, Etc., 107 R.I. 104, 265 A.2d 429 (1970); Committee v. Val Vue Sewer Dist., 14 Wash. App. 838, 545 P.2d 42 (1976). The United States Supreme Court has applied the same principle in holding that realty sold on contract by the United States to private individuals or corporations is subject to state and local taxation: S.R.A., Inc. v. Minnesota, 327 U.S. 558, 66 S.Ct. 749, 90 L.Ed. 851 (1946); New Brunswick v. United States, 276 U.S. 547, 48 S.Ct. 371, 72 L.Ed. 693 (1928). See also 91 C.J.S., Vendor & Purchaser § 106.

The Department stated in Howard M. Wilson, 63 I.D. 36, 38 39 (1956):

In common usage, "whole title" or "title in fee" contemplates ownership in fee simple, that is, ownership of an estate of inheritance as distinguished from an estate for life or for years. Such an estate excludes all restrictions or qualifications as to the persons who may inherit as heirs.

In Wilson the Department ruled that the Navajo Tribe held "whole title in fee" within the meaning of the regulation, since it was the beneficial owner of the surface interests in the land, although the United States held naked legal title to the land, and although the minerals were held by another, being reserved to the grantor under a deed to the United States in trust for the tribe.

Wilson establishes that this Department will look to the true beneficial ownership to determine the party entitled to a preference right under the Act and the regulations, even though the legal title resides in another. Similarly, in Brent L. Sellick, A-30007 (October 5, 1964), a preference claim was honored although the preference claimant had transferred the legal title under a land sale contract. The Department recognized there was no transfer of the right of possession and that the legal title was conveyed by the contract merely as a security interest. Although we do not have all the details of the transaction, that holder of the equitable, beneficial interest in the land was deemed to have the "whole title in fee," even though the legal title had been conveyed as a security interest. These cases recognize that the term "whole title in fee" should not be interpreted as limiting the preference right to a person who holds the beneficial title to an estate but has passed the legal title for security.

While there are some differences between rights and obligations under a land sale contract giving the right of possession and other

indicia of ownership and those where a purchaser receives a deed and conveys a mortgage, there is no reason under the governing statute for differentiating between the two situations. In the first case the purchaser receives equitable title, while in the second he receives legal title. But in both uses he is regarded as the real or beneficial owner. In both cases conditions of nonpayment to the holder of the security interest might defeat the purchaser's rights after appropriate actions by the holder of the security interest.

Dudley S. Long, supra, is distinguishable. The contract purchasers of contiguous land (the Emerys) timely asserted a preference right to purchase in their own behalf and tendered an amount of money to meet the high bid. Later they directed BLM to transfer the deposited tender to Dudley S. Long and Veva Long. This letter stated that "[i]t was the purpose and intent to make the bid in their [the Long's] names so they would have the property." There was also included a certificate of ownership, certified by a title company, showing that on October 18, 1973, the Longs were the sole owners in fee simple of the lands contiguous to the tract in issue.

In essence, the Oregon State Office ruled in the decision below that because the owners of fee title to the surrounding private lands, the Longs, did not personally offer to purchase the tract within 30 days of the auction, and preference right provided by 43 CFR 2711.4(b)(2) was lost. The decision below pointed out that though the

Emery Livestock Company and the Emerys directed the transfer of the deposit from their account to that of the Longs, the statement indicating an agency relationship existed between them had not been corroborated by the Longs at that time. Long was decided on the basis that we will not sanction an "after the fact" ratification to the prejudice of the Government or of third parties, e.g., the high bidder. Long, supra at 22.

We are impelled to the conclusion that a person who has contracted to purchase land, has made partial payment therefor, and is in possession thereof pursuant to the contract is the "owner" thereof, within the ambit of 43 CFR 2711.4(b)(2). Davidson is overruled to the extent it is inconsistent with this decision.

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 reversed and the case remanded for appropriate action consistent herewith.

Frederick Fishman
Administrative Judge

We concur:

Anne Poindexter Lewis
Administrative Judge

James L. Burski
Administrative Judge

ADMINISTRATIVE JUDGE THOMPSON CONCURRING:

I agree that the Board's decision in Robert A. Davidson, 13 IBLA 368 (1973), should be overruled. I would also overrule to the extent it is inconsistent, Dudley S. Long, 16 IBLA 18 (1974). Although the Long case rested upon an agency ground, to the extent it implies that the equitable owner of land under a land sale contract could not assert the preference right as the owner of the "whole title in fee," it should also be overturned. Davidson and Long were decided under the provisions of the regulations implementing the Public Sales Act, as amended, 43 U.S.C. § 1171 (1970). That Act has been repealed by section 703(a) of the Federal Land Policy and Management Act of 1976 (FLPMA), 90 Stat. 2790. However, the regulations pertaining to the Public Sales Act were followed in determining rights under the Unintentional Trespass Act of September 26, 1968, 82 Stat. 870, as amended by section 214 of FLPMA, 43 U.S.C. § 1722 (1976).

The basic question under both statutes on who may have a preference (or right of first refusal under the amended Unintentional Trespass Act) is who is an "owner" of land contiguous to the land to be sold. Regulation 43 CFR 2711.4(b) under the Public Sales Act made applicable to the sales under the Unintentional Trespass Act (by 43 CFR 2785 (1971)) requires a preference-right applicant to submit

proof of "ownership of the whole title to the contiguous lands." Proof includes a certificate of the local recorder of deeds, an abstract of title or a certificate of title prepared and certified by a title company or by an abstracting company, or by a duly qualified attorney authorized to practice in the state stating "on the basis of an examination of title records that the applicant owned adjoining land in fee simple on the last day of the 30-day period." A statement was timely filed by appellant's attorney in this case that appellant was owner of contiguous lands in fee simple, however, it did not include a statement that this was based upon an examination of the records. Thereafter, supplemental information was submitted showing the contract of sale, warranty deed, and additional documents. For the reasons I expressed in my dissent in Robert A. Davidson, supra at 372, such clarifying proof should be accepted and the preference right acknowledged.

Because the term "owner of the whole title in fee" applicable in the Public Sales Act regulations is followed for the Unintentional Trespass Act cases, the meaning should be the same. I agree that the vendee and equitable interest holder of the fee simple title comes within the meaning of the regulations and is qualified as the owner of contiguous lands to be entitled to the right of first refusal under the Unintentional Trespass Act. My views of the proper interpretation to be given to the regulations under the Public Sales Act, which are

to be applied here, were set forth in the dissent in Robert A. Davidson, *supra*. For both the procedural and substantive reasons expressed in my dissent in Davidson showing the history of the regulations and of pertinent Departmental decisions, I agree with the result reached in Judge Fishman's opinion and disagree with Judge Stuebing's opinion. Some of the substantive reasons I discussed in Davidson are reiterated in Judge Fishman's opinion. Additional reasons are given in my dissent in Davidson and will not be repeated here. I adhere to those views.

Joan B. Thompson
Administrative Judge

ADMINISTRATIVE JUDGE STUEBING DISSENTING:

Regrettably, it will be necessary to reiterate the salient regulation in order to illustrate my difference with the majority. 43 CFR 2711.4(b)(2) provides:

(2) Each preference-right applicant must, within the time specified by the authorized officer, or such extensions of time as he may grant, submit proof of ownership of the whole title to the contiguous lands, that is, he must show that he had the whole title in fee on the last day of the 30-day period. The authorized officer will specify that date. Such proof must consist of (i) a certificate of the local recorder of deeds, or (ii) an abstract of title or a certificate of title prepared and certified by a title company or by an abstracting company, or by a duly qualified attorney authorized to practice in the State stating on the basis of an examination of title records that the applicant owned adjoining land in fee simple on the last day of the 30-day period. If the preference-right applicant does not own adjoining land at the close of the preference-right period, his preference-right claim will be lost. After a case has been closed, the data filed pursuant to this section may be returned by the authorized officer. [Emphasis added.]

In order to qualify for a preference right, then, the applicant must prove that he was the owner of the whole title in fee simple on the last day of the 30-day period by submitting either the certificate of the local recorder, a certificate or an abstract of title by a title insurance or abstract company, or an attorney's opinion, all or any of which must be based upon an examination of the title records.

The first point I wish to make is that whatever interest appellant may have had in the contiguous land at that time was not

reflected by the title records. As noted in Judge Fishman's opinion, the county clerk of Carbon County advised BLM that, "Our last title of record * * * is listed in the name of James and Helen Chapman." Thus, it was manifestly impossible for appellant to provide the proof required by the regulation to support his claim to a preference right.

Judge Fishman's opinion states, "The record, however, contains a land sales contract, dated December 11, 1974, by which James A. and Mary Helen Chapman agreed to sell to appellant certain lands including those upon which appellant bases his preference right status." I hasten to point out that Judge Fishman's allusion to "the record" refers to the administrative record before this Board on appeal, not to the land title records of Carbon County, Wyoming. Since the opinion of the attorney which was tendered by appellant in purported compliance with 43 CFR 2711.4(b)(2) was not made "on the basis of an examination of title records," as that regulation requires, BLM properly refused to recognize it. This is reason enough to affirm BLM's decision.

In Jess R. Manuel, A 27482 (Nov. 29, 1957), the Department encountered a form of proof which did not conform to the requirements of the regulation. In disallowing it, and the conforming proof which was later filed, the Department said:

The regulation plainly requires in mandatory terms that proof of ownership be shown in one of two ways. The

appellant does not contend that he qualified under (ii)(a) (supra), but he urges that the certificate of the Supervising Land Title Abstractor of the State Lands Commission satisfies (ii)(b) (supra). However, the State Lands Commission is an agency of the State of California to which the United States conveyed the property used to substantiate Manuel's preference right claim. It is, in effect, nothing more than a statement by the owner of land as to his own title and, as such, it cannot be accepted as the statement required by the regulation. Where the proof of ownership does not comply with the regulation, the Department has held that the preference right is lost even though the proof clearly shows the claimant to have been the owner of adjoining land, at least prior to the sale. William H. Boyd, Clarence Virgil West, A-27440 (June 3, 1957); see Fred and Mildred M. Bohlen et al., 63 I.D. 65 (1956). When Manuel filed a proper certificate of the local recorder of deeds on May 14, 1956, the 30-day period had long since elapsed and he had lost his right to assert a preference right to purchase. Id. [Emphasis added.]

In E. E. Larson, A 27462 (Sept. 17, 1957), the proof of contiguous ownership consisted of a deed on a tax foreclosure, a warranty deed, and a copy of a contract for sale. The claim of preference was rejected because the proof did not conform to the requirements of the regulation, and the subsequent proof was not filed timely. The Department affirmed.

The second point I wish to make is that the contract executed by and between the Chapmans and the appellant cannot possibly be construed as investing appellant with "ownership of the whole title in fee simple," even were it of record. The contract provides, in part: "10. Recording agreement. This agreement shall not be placed of record but there shall be placed of record an instrument entitled "Notice of Execution of Agreement" a copy of which is attached hereto as Schedule "G"."

Turning to Schedule "G" (a copy--not the original), there is no showing it was ever recorded. We do find however, that the instrument declares that the Chapmans and Tuttle have executed an agreement whereby "said J. Burton Suttle [sic] has the right during the term of said agreement to purchase" (emphasis added) the property thereafter described. Returning now to the basic contract instrument, we find that it provides that the Chapmans are to execute a standard statutory warranty deed conveying the property to appellant. This deed, however, is not to be delivered to appellant. Instead it is to be held in escrow by the Rawlins National Bank, and not delivered to appellant until and unless the Chapmans receive the entire purchase price and interest.

In the event of a default, notice must be given and demand made for full payment within a specified time, failing which, in the words of the contract "then the Seller shall be relieved of all liability and obligations from conveying the property and shall retain all payments made hereunder as liquidated damages for breach of this agreement and as rent for the use and occupation of said property * * *" (Emphasis added.)

The contract further provides that the Chapmans may then notify the escrow agent and demand redelivery to them of the deed. The agent must then require Tuttle to pay the entire amount within 30 days, failing which "the escrow agent shall redeliver said deed and other escrow documents to the Seller."

From the foregoing it is clear that no conveyance of this land had taken place while the contract was still executory, as it was when appellant asserted his preference right to buy the contiguous Federal land. The instrument itself speaks of the sellers' obligations to convey in future terms. The deed from the Chapmans to Tuttle was withheld from Tuttle precisely because a deed is not effective to convey title until delivery. "An instrument delivered to a third person subject to recall before delivery to the grantee is not effectual to pass title." (Emphasis added.) 23 Am. Jur. 2d, Deeds. Delivery to third person § 96 (1965).

What appellant had at the critical moment is perfectly described by the legal term "inchoate" title, which means "[i]mperfect; partial; unfinished; begun but not completed" Black's Law Dictionary, 4th ed. p. 904. Surely, the majority errs when it equates such an interest with ownership of the whole title in fee simple.

By analogy, suppose the preference right claimant were the owner of an unpatented mining claim which was valid in every respect, but the claimant had not yet completed his required \$500 worth of improvements. Would the majority consider him the owner of the whole title in fee simple? I rather suspect not, although once the improvement work was done he would be entitled to receive fee patent as a matter of law.

The third point I wish to make is that the majority has misconstrued the language of the regulation and, in so doing, frustrated its purpose. Such words as "ownership of the whole title," and "has the whole title in fee," and "owned adjoining land in fee simple" can hardly have been included accidentally or through ignorance. We should recognize that when the drafter of the regulation wrote the requirement that a preference right applicant must show ownership of the whole title in fee simple to the contiguous lands, that is precisely what was intended. Yet the majority presumes to hold that appellant's equity in the contiguous land created by partial payment of the purchase price under the contract, coupled with his possession of the land, constitutes ownership of the whole title in fee simple, notwithstanding the fact that appellant had not paid the full purchase price, no conveyance had been made, and the holders of the legal title (the Chapmans) had the right to refuse to convey if the appellant defaulted. This is errant nonsense.

Clearly, the regulation was written to insure that the person who asserted the preference right would join the subject Federal land to the contiguous lands on which that preference was based. If the preference right applicant acquired the Federal land but lost the adjacent private land to another holder of an outstanding interest, the object and purpose of the preference right would be defeated. Therefore, to insure that the objective would be met, the regulation requires that only those who can prove ownership of the whole title in fee simple are eligible to assert a preference right.

Alaska Placer Co., 33 IBLA 187, 84 I.D. 990 (1977), is a case in point. There the corporate owner of a group of mining claims contracted to sell the claims to a husband and wife on a conditional contract of sale, with a down payment and successive installments. The buyers defaulted, the corporation declared their interest forfeited, refused to convey, and ordered the buyers to vacate. When the buyers refused, the Supreme Court of the State of Alaska held that the buyers were mere trespassers after default and enjoined their continued occupancy. We held in that case that the possession of the putative buyers was in recognition of the title held by the seller, and was in law the occupancy of the seller by those whom the seller put into possession under a conditional contract to deed.

Judge Fishman's citations of various authorities which construe the term "owner" to include an equitable owner are not germane to the issue of what is meant by "ownership of the whole title in fee," which I regard as a much more specific and restrictive qualification. The one case cited by Judge Fishman which defines "whole title in fee" as he does, is Howard M. Wilson, 63 I.D. 36 (1956), and that case is distinguishable on its peculiar facts. There the United States had acquired certain land in trust for the use and benefit of the Navajo Tribe of Indians. The Department held that under those circumstances, "For all practical purposes, the Tribe owns all that was conveyed by deed and * * * may be considered to be the owner of contiguous land within the meaning of the public sale law although naked legal title

to the land is in the United States." Of course, in that instance it was true, as it was, and is, inconceivable that the United States could or would violate its trust responsibilities and attempt to oust the tribe and acquire the tribe's interest in the land. The tribe in that case was not exposed to the loss of its interest through prescribed conditions and contingencies, as appellant in this case was, nor was there any further conveyance contemplated to complete the transaction, as there was in this case, nor did the tribe owe any further obligation to perform, as did the buyer in this case.

When BLM was first confronted with this situation, it sought and acted upon the advice of the Department's Regional Solicitor. The Regional Solicitor's opinion that Tuttle was not a qualified preference right applicant was based on two previous decisions of this Board, *i.e.*, Dudley S. Long, 16 IBLA 18 (1974), and Robert A. Davidson, 13 IBLA 368 (1973). Both decisions were authored by Judge Fishman, both involved the assertion of a preference right by one who was purchasing under a contract, and in each case the rejection of the applicant's claim to a preference right was affirmed by this Board. In the Long case, *supra*, the Longs were selling the adjacent land to the "Emery Brothers," who attempted to assert a preference right. BLM rejected on the ground that the Longs were the owners of the fee title, whereupon the Emerys attempted to show that they were acting on behalf of the Longs. The Board, applying agency law, held that we could not recognize the right of the Emerys to act

for the Longs, nor could we recognize their joint assertion on appeal that together they held the whole title to the adjacent land.

In Davidson, supra, an en banc decision, the Board faced a fact situation almost identical to the instant case. Davidson, who was purchasing contiguous land from one Chamberlain under a contract to deed, asserted a preference right. He was rejected by BLM because the county clerk and recorder certified that the owner of record was Chamberlain. In affirming BLM's decision, the Board made a number of highly significant declarations, viz:

In his statement of reasons appellant's attorney states that "appellant Davidson does have the "title in fee", as he is in just and legal possession of the contiguous property * * *." The attorney further states that under the land sales contract there remained an unpaid balance of \$8,600 of a total purchase price of \$76,375. He urges that a contract for deed should be accorded the same legal impact as a "deed over-mortgage back" transaction. We proceed to consider first the question whether the documents filed by appellant on October 13, 1972, satisfied regulatory requirements.

* * * Appellant's recital on the form that he holds a "contract for deed from Lawrence A. Chamberlain and Leona A. Chamberlain dated June 8, 1960" does not satisfy the regulations, since it does not fall within any of three categories spelled out in the regulation. See Jess R. Manuel, A-27482 (November 29, 1957); E. E. Larsen, A-27462 (September 17, 1957); William H. Boyd, A-27440 (June 3, 1957).

The preference right provisions of the Public Lands Sale Act and regulations have been strictly construed. See Charles Kik, A-27872 (December 1, 1959); Lawrence V. Lindbloom, A-27993 (August 4, 1959). Cf. Albert P. Comer, A-28150 (April 5, 1960). The rights of a good faith high

bidder, as well as those of a contiguous landowner, are involved. [Footnote omitted.]

The Davidson decision was well founded when written, was approved en banc by a majority of the Board, and remains the proper rule in such cases. It served as the predicate for BLM's decision in the instant case, and it should not be overruled lightly.

Finally, the majority ignores a point which was of serious concern to the Board in arriving at its holding in Davidson, *i.e.*, the right of the high bidder to purchase the land absent the intervention of a qualified claimant to a preference right. By "liberalizing" the interpretation of the regulation so as to equate an inchoate equitable interest with ownership of the whole title in fee simple, the Board will deprive the high bidder of what otherwise would be his/her right to purchase the land in other similar cases.

In summary then (1) the proof submitted by appellant did not meet the requirements of the regulation as it was not based upon an examination of the title record; (2) an inchoate equitable interest based upon a contract which is still executory and where no conveyance has been made to the purchaser and none is intended until some future time does not invest the purchaser with ownership of the whole title in fee simple; (3) the decision of the majority defeats the purpose of the regulation in that there is no firm assurance that the preference

right purchaser will become the owner of the contiguous land which serves as the basis for the assertion of the right; and (4) it can defeat the right of a high bidder to purchase the land--a right which would continue to be enjoyed had we adhered to our own good precedent set in the Davidson case.

Edward W. Stuebing
Administrative Judge

We concur:

Joseph W. Goss
Administrative Judge

Douglas E. Henriques
Administrative Judge

