

MARLYN HAUGEN ET AL.

IBLA 81-681

Decided March 25, 1982

Appeal from a decision of the Eastern States Office, Bureau of Land Management, rejecting class 1, color-of-title application.

Affirmed.

1. Color or Claim of Title: Generally--Indian Lands: Ceded Lands--Words and Phrases

"Public Lands." Lands ceded by the Chippewa Indians under the Act of Feb. 20, 1904, 33 Stat. 46, which were unappropriated under the terms of said Act, and which were restored to tribal ownership in 1945, were never "public lands" within the meaning of the Color of Title Act, 43 U.S.C. § 1068 (1976), and a color-of-title application for such land must be rejected.

APPEARANCES: Neil A. McEwen, Esq., Thief River Falls, Minnesota, for appellants.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

Marlyn Haugen and Deloris Haugen appeal from a decision of the Eastern States Office, Bureau of Land Management, dated April 14, 1981, rejecting their color-of-title application for a 40-acre parcel of land consisting of the SW 1/4 NW 1/4, sec. 22, T. 152 N., R. 41 W., fifth principal meridian, Minnesota.

The land sought in their application had originally been part of lands reserved for the Red Lake and Pembina Bands of Chippewa Indians under treaties proclaimed in 1838 and 1864. See 7 Stat. 536, 13 Stat. 667, 689. Pursuant to the Act of February 20, 1904, 33 Stat. 46, 48, various land, including that involved herein, was ceded, surrendered, granted, or conveyed to the United States. Such lands were to be opened to entry under the homestead laws and were to be purchased at a price of no less than \$4 per acre. While the treaty as submitted obligated the United States to pay \$1 million for the ceded lands, Congress amended this provision to provide payment out of the fees obtained from selling the land. Thus, section 4 of the Act provided:

That nothing in this Act contained shall in any manner bind the United States to purchase any portion of the land herein described, or to guarantee to find purchasers for said lands or any portion thereof, it being the intention of this Act that the United States shall act as trustee for said Indians to dispose of said lands and to expend and pay over the proceeds received from the sale thereof only as received as herein provided.

Apparently, an individual named Nic Nelson commenced living on the parcel in 1905. While appellants contended that Nelson had complied with the homestead laws there has been absolutely no proof tendered to support such an argument. In any event, it is clear that no patent from the Government ever issued for this land. The first evidence of a claim or title consists of a tax certificate issued by Pennington County pursuant to a tax forfeiture sale in 1913. The chain of title commencing with the sale has continued up to the present applicant.

In 1945, however, then Assistant Secretary Chapman, under the authority of sections 3 and 7 of the Indian Reorganization Act of 1934, 48 Stat. 984, 986, 25 U.S.C. §§ 463, 467 (1976), restored approximately 157,000 acres of ceded land, for which the Indians had not been paid, to tribal ownership for the use and benefit of the Red Lake and Pembina Bands of Chippewa Indians. The lands were restored, "subject to any existing valid rights." 10 FR 2448, 2449 (Mar. 2, 1945). The lands involved herein were included in this restoration.

Appellants acquired possession of the parcel in 1966 and have paid the property taxes since that time. It was not until the mid-1970's that any controversy arose concerning their claim to the lands in issue. In 1977, the Government instituted a suit in ejectment on behalf of the Red Lake Band of Chippewa Indians. By a memorandum and order of June 28, 1978, the Chief Judge of the District Court of Minnesota granted summary judgment for the United States, and rejected various defenses including adverse possession, laches, estoppel, statute of limitations, and res judicata. See United States v. Haugen, Civ. No. 6-77-142 (June 28, 1978). The court noted:

Based on the record, therefore, motion for summary judgment is granted. However, although the parties have made no reference to this in their briefs, the defendants may well come under the protection of the Color of Title Act, 43 U.S.C.A. § 1068. This act provides that under certain circumstances, the public lands of the United States may be adversely possessed. According to its provisions, all applications for patents under this act must be made to the Secretary of the Interior. * * *

The Clerk is directed to delay the entry judgment 30 days to permit defendants, if so minded, to seek relief under the Color of Title Act. If defendants do so, the court will entertain a motion for further needed relief pending decision by the Secretary of the Interior.

Appellants filed their color-of-title application on July 31, 1978. After a lengthy review, including a field report favorable to a class 1 color-of-title claim, ^{1/} the Director of the Eastern States Office asked for an opinion from the Assistant Solicitor, Realty, on whether Indian land once open to settlement but now returned to Indian ownership was subject to the provisions of the color-of-title Act. By memorandum of August 8, 1980, the Associate Solicitor's Office, noting that "the subject lands, while open to settlement under the homestead laws, nevertheless retained the status of 'Indian lands' and as such were held in trust by the United States and could not be disposed of without adequate compensation to the Red Lake Reservation Indians." Based on this analysis, the Eastern States Office, by decision of April 14, 1981, rejected the color-of-title application. From this action appellants have brought their appeal.

We note initially that questions of the status of the lands affected by the Act of February 20, 1904, supra, were examined in a 1958 Solicitor's Opinion, Status of Land Lying Within a Defined 60-Foot Boundary Line Between the United States & Canada, M-36368 (Sept. 12, 1956). In that Opinion, Solicitor Armstrong discussed whether land ceded pursuant to the Act of February 20, 1904, was subject to proclamations of withdrawal issued by President Roosevelt in 1908 and President Taft in 1912. The Solicitor noted that in a similar case, Ash Sheep Co. v. United States, 252 U.S. 159 (1920), the Supreme Court had held that lands ceded by the Crow Nation pursuant to the Act of April 27, 1904, 33 Stat. 352, were "Indian lands" rather than "public lands" until the contemplated sales of parcels were made. Applying the same analysis, the Solicitor concluded that such ceded lands which had not been appropriated under the homestead laws as provided in the Act of February 20, 1904, were not "public land" and were therefore not subject to the two Presidential withdrawals. ^{2/}

The similarities between the Act effecting a cession of part of the Crow Reservation in Montana and the Act ceding part of the Chippewa Reservation in Minnesota are striking. Both provided for the sale of ceded lands to homestead settlers, at not less than \$4 per acre. Moreover, both provided that it was "the intention of this Act that the United States shall act as trustee for said Indians to dispose of said lands." See 33 Stat. 49, 361. In interpreting this provision in Ash Sheep Co. v. United States, supra, the Supreme Court holds:

Taking all of the provisions of the agreement together we cannot doubt that while the Indians by the agreement released their possessory right to the Government, the owner of the fee,

^{1/} Since a class 2 color-of-title claim must be based on adverse possession of land under color of title commencing no later than Jan. 1, 1901, it was easily determined that appellants could not qualify for a class 2 claim.

^{2/} While Solicitor's opinions are not binding on this Board (see, e.g., Amoco Production Co., 24 IBLA 227 (1976)) we do accord them careful consideration and substantial weight. Herein, not only has appellant failed to undermine the Solicitor's conclusions, but our own analysis has reached the same result espoused in the opinion.

so that, as their trustee, it could make perfect title to purchasers, nevertheless, until sales should be made any benefits which might be derived from the use of the lands would belong to the beneficiaries and not to the trustee, and that they did not become "Public lands" in the sense of being subject to sale, or other disposition, under the general land laws. * * * They were subject to sale by the Government, to be sure, but in the manner and for the purposes provided for in the special agreement with the Indians * * *. Thus, we conclude that the lands described in the bill were "Indian Lands" when the company pastured its sheep upon them, in violation of § 2117 of Revised Statutes * * *.

Id. at 166 (citations omitted). This analysis would seem equally applicable herein.

It has long been noted that the Color of Title Act applies only to "public land," which has been defined as "vacant, unappropriated, unreserved Federal real property subject to the public land laws." Palo Verde Valley Color of Title Claims, 72 I.D. 409, 411 (1965). See also Beaver v. United States, 350 F.2d 4, 10 (9th Cir. 1965). Thus, if the land embraced by a color-of-title claim was withdrawn, reserved, or otherwise appropriated as of the initiation of the claim, it cannot be recognized. See, e.g., Margaret C. More, 5 IBLA 252 (1972); Palo Verde Valley Color of Title Claims, supra. Inasmuch as we have determined that the subject lands were never "public lands" within the meaning of the Color of Title Act, it must follow that appellants' application be rejected.

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.

James L. Burski
Administrative Judge

We concur:

Anne Poindexter Lewis
Administrative Judge

Gail M. Frazier
Administrative Judge

