

**Editor's note: Reconsideration denied by Order dated May 17, 1984**

MALCOLM C. AND HELENA M. HUSTON

IBLA 82-1076

Decided March 29, 1984

Appeal from decision of the California State Office, Bureau of Land Management, rejecting color-of-title application CA-1719.

Affirmed.

1. Color or Claim of Title: Generally--Color or Claim of Title: Applications

An applicant under the Color of Title Act has the burden of proof to establish to the Secretary of the Interior's satisfaction that the statutory conditions for purchase under the Act have been met. The applicant must establish that each of the requirements for a class 1 claim has been met. A failure to carry the burden of proof with respect to one of the elements is fatal to the application.

2. Color or Claim of Title: Improvements

To establish a class 1 color-of-title claim, made under the Color of Title Act, claimed improvements must enhance the value of the land. A one-lane dirt road that passes through the applied for tract as access to adjacent land cannot be considered a valuable improvement.

3. Color or Claim of Title: Cultivation

To establish a class 1 color-of-title claim, made under the Color of Title Act, land must be reduced to cultivation at the time of filing the claim application. Although the continued planting of fruit and nut trees on a yearly basis is such activity that may qualify for cultivation of agricultural crops, that activity will not qualify under the Color of Title Act when conducted after the applicant has become aware of the fact that his title to the land is defective.

APPEARANCES: Malcolm C. Huston, pro se.

## OPINION BY ADMINISTRATIVE JUDGE LEWIS

Malcolm C. and Helena Maxine Huston have appealed from a decision of the California State Office, Bureau of Land Management (BLM), dated June 16, 1982, which rejected their color-of-title application CA-1719. The Hustons asserted a claim of ownership pursuant to the provisions of the Color of Title Act, 43 U.S.C. § 1068 (1976), for a portion of lot 79 B of the Fidelity millsite claim in sec. 30, T. 6 N., R. 13 E., Mount Diablo meridian, Calaveras County, California, initially containing 3.01 acres. BLM rejected appellants' claim of ownership because the application failed to show sufficient evidence of either cultivation or improvements as required by the Act.

The Color of Title Act provides:

The Secretary of the Interior (a) shall, whenever it shall be shown to his satisfaction that a tract of public land has been held in good faith and in peaceful, adverse, possession by a claimant, his ancestors or grantors, under the claim or color of title for more than twenty years, and that valuable improvements have been placed on such land or some part thereof has been reduced to cultivation \* \* \* issue a patent for not to exceed one hundred and sixty acres of such land upon the payment of not less than \$1.25 per acre \* \* \*.

The regulations in 43 CFR 2540.0-5(b) refer to applications under this portion of the Act as a claim of class 1. 1/

The record shows that Mr. Malcolm C. Huston first filed an incomplete application in his own name May 15, 1974, in the amount of 3.01 acres. He claimed ownership of three separate parcels of lot 79 B of the Fidelity millsite claim. In his application Huston claimed to have purchased the land in July of 1972 by deed for the purchase price of \$1,500. He traced his ownership to his predecessors who, he asserted, had handed down the tract to each successive owner since March 6, 1894. 2/ On March 18, 1982, Mr. Huston

1/ The regulation states:

"(b) The claims recognized by the act will be referred to in this part as claims of class 1, and claims of class 2. A claim of class 1 is one which has been held in good faith and in peaceful adverse possession by a claimant, his ancestors or grantors, under the claim or color-of-title for more than 20 years, on which valuable improvements have been placed, or on which some part of the land has been reduced to cultivation. A claim of class 2 is one which has been held in good faith and in peaceful, adverse possession by a claimant, his ancestors or grantors, under claim or color of title for the period commencing not later than January 1, 1901, to the date of application, during which time they have paid taxes levied on the land by State and local government units."

2/ Appellant has submitted with his application evidence of the conveyances of record for the applied-for land from the Calaveras Title Company which shows the following chain of title:

withdrew his application as to parcels he identified as numbers 3 and 4, reducing his claim to the remaining parcel 1, containing approximately 1.5 acres.

After continuing correspondence with BLM concerning the completion of his application, Helena Maxine Huston joined in filing a completed class 1 claim application dated May 26, 1982. This action was taken when it became known, from a conveyance statement prepared by a title company, that the last recorded conveyance for the tract in question was from Ernest J. and Maxine V. Allen to Malcolm C. and Helena Maxine Huston.

In their application the Houstons claimed valuable improvements on the land consisting of a road valued at \$900. In section 8b of the application they stated:

This \$900.00 represents the sum that Mr. Allen paid a man to bulldoze a road into the property in the late 1950's. As the original road was along the creek and was washed out by heavy winter rains. Under specific instructions 3, on back of application, (claims for Class 1 must have either valuable improvement). The road is not structural improvement as stated on front of application, but is valuable improvement.

They also claimed cultivation of part of the tract from 1972 to 1982 by the planting of fruit and nut trees originally valued when planted at \$192. In section 8c of the application they stated:

When I bought the property, Mr. Allen had planted one apple tree. Since I purchased the property in 1972, I have added about 3 trees a year where as of this date I have: 14 apple trees cost at planting \$10.00 each, 2 walnut trees at \$10.00 each, 2 cold weather apricots at \$10.00 each, 4 grapes at \$3.00 each, total value \$192.00. The apple trees are just coming into bearing size in the last couple of years. I cannot estimate their value now.

A series of photographs submitted with the appeal show a one-lane dirt road with a gate on the property. They also show various mature fruit and nut trees on the tract and their location in relation to the road.

fn. 2 (continued)

| GRANTOR             | GRANTEE              | DATE     |
|---------------------|----------------------|----------|
| (a)                 | (b)                  | (c)      |
| Calder Innes        | Edward Gilomen       | 6-18-34  |
| Edward Gilomen      | Thomas Taylor        | 12/2/52  |
|                     | Ernest E. Allen      |          |
| Thomas Taylor       | and Ida J. Allen     | 5/23/53  |
| Ida J. Allen        | Ernest E. Allen      | 10/30/63 |
| Ernest J. Allen and | Malcolm C. Huston    |          |
| Maxine V. Allen     | Helena Maxine Huston | 7/6/72   |

A BLM land report dated January 26, 1982, conducted for an appraisal of the tract for a direct sale, characterizes the land as an isolated tract of public land that is completely surrounded by private property. The report states that "the area is mostly undeveloped open space land. The terrain consists of rolling hills covered by ponderosa pine, incense cedar, oaks, brush and grasses. There is evidence that mining has occurred on the subject land although none of the work was recent \* \* \*."

BLM found the road insufficient as an improvement, stating in its decision: "The road was constructed by the applicant's predecessor. It provides access to their home situated on the patented mining claim. There are no structural improvements on the applied-for land, such as a home or a business. The claim of having placed valuable improvements on the land fails."

BLM found no qualifying cultivation, stating:

Traditionally, cultivation has been considered as breaking, planting and tillage for the purpose of crop production. Orchards, by their very nature, do not fall within this interpretation.

With the exception of one, all the trees have been planted since the applicants admit that they knew the land belonged to the United States. Therefore, even if an orchard could qualify as reducing the land to cultivation [sic], the application would fail because the trees were planted with the knowledge that the land belonged to the United States. The claim of meeting the cultivation requirement fails.

BLM chose not to consider the issue of good faith, stating:

When the application was first filed, it appeared that Mr. Huston did not meet the good faith requirement because he knew or should have known that he was acquiring defective title and that title to the land was in the United States. Mr. Huston denies this, and we make no determination in this respect because the application fails in other respects.

Appellants challenge the rejection of their application arguing that the parcel does contain valuable improvements. Appellants state:

No place in the Color-of-Title Act does it say that the valuable improvement has to be structural. \* \* \* Websters Dictionary Second College Edition, states, Improvement: A change or addition to land or real property as a sewer or a fence, etc. to make it more valuable. (Enclosure #4) Now, if a sewer or a fence is considered valuable improvement, surely a road is an improvement and valuable. In fact the addition of fruit and nut trees is in itself a valuable improvement on the land.

Appellants contend the road has more value than merely providing access to their home stating:

The road was built many years before the existence of a cabin. On the mining claim, the road was built so the land which it is on could be made usable as this is hill country and it varies

from 45 degrees to 60 degrees incline. By bulldozing the side of the hill out it gave to the land a usable flat area.

Appellants assert that their orchard should qualify as cultivation. They contend: "To plant trees you have to prepare the soil for planting, and plant seedlings. The soil between my trees I keep in grass and am slowly rotating the crop over for the planting of clover to produce honey for my bee hives." In support of this contention appellants have submitted a statement from a representative of the Department of Agriculture who expresses his personal view that the planting of fruit trees and grapes is cultivation. <sup>3/</sup> Appellants' photographs show the size of the various fruit and nut trees and their location in relation to the road and the condition of the road.

[1] First, it is well established that an applicant under the Color of Title Act has the burden to establish to the Secretary of the Interior's satisfaction that the statutory conditions for purchase under the Act have been met. Jeanne Pierresteguy, 23 IBLA 358, 83 I.D. 23 (1975); Homer W. Mannix, 63 I.D. 249, 251 (1956). A failure to carry the burden of proof with respect to one of the elements is fatal to the application. The applicants must establish that each of the requirements for a class 1 claim has been met. Corrine M. Vigil, 74 IBLA 111 (1983); Lester Stephens, 58 IBLA 14 (1981).

[2] Appellants rely on the road across the tract, originally built for \$900, as the primary improvement for their claim. We have repeatedly pointed out that for improvements to qualify as valuable improvements within the meaning of 43 CFR 2450.0-5(b), they must have existed on the land at the time the application was filed, and must enhance the value of the land sought. Pedro A. Suazo, 75 IBLA 212 (1983); Lester Stephens, supra.

From our review of the record we agree with BLM that this is merely a dirt road which only has any real value in that it provides access to appellants' improvements on adjacent lands. Although appellants claim it provides a flat area on the tract, this would appear to be in a limited area and of minimum benefit. A one-lane dirt road that passes through the property cannot be considered a valuable improvement. Gladys Lomax, 75 IBLA 89 (1983). See United States v. Bunch (On Judicial Remand), 64 IBLA 318 (1982), aff'd, Bunch v. Kleppe, Civ. No. A-76-115 (D. Alaska Jan. 14, 1983).

<sup>3/</sup> Appellants have submitted a letter dated June 1, 1982, to Congressman Tom Lantos from Howard J. Brooks, National Research Program Leader, USDA, which states in pertinent part:

"[B]ased on my educational background through the Ph.D. degree and my 22 years of research experience with fruit, nut, and specialty crops with the USDA \* \* \*. It is my personal view that the planting of fruit trees and grapes should be considered as cultivation. It certainly is considered as such in agricultural circles. In order to plant an orchard, it is first necessary to plow and prepare the land and then cultivate between the trees during the first few years. As the orchard gets older, it is common practice to establish grass between the rows of trees. Since I do not know the size of the property in question, I cannot judge if the 18 trees and 4 grape vines would be considered adequate to make a profit. Commercial orchard trees are normally planted at distances of 12-30 feet apart."

The lack of a valuable improvement, however, will not prove fatal to the application if the applicants can show sufficient cultivation of this tract. Appellants have provided evidence of the planting of fruit and nut trees and grapes and have provided an agricultural expert's opinion for their contention that this type of activity should qualify as cultivation.

[3] Generally, throughout the public land law "cultivation" has been viewed as a continuing activity with necessary efforts leading to the production of crops. This Department, in applying the cultivation requirement for patent under the homestead law, has consistently ruled that there must be a breaking, planting, or seeding and tillage for a crop to be done in such a manner as to be reasonably calculated to produce profitable results. *E.g.*, Clarence Ray Mathis, 29 IBLA 150 (1977); United States v. Nelson (Supp. I), 28 IBLA 314 (1977). The same standard has been applied to color-of-title applicants. Bernard R. Snyder, 70 IBLA 207 (1983); Mabel M. Farlow (On Reconsideration), 39 IBLA 15, 86 I.D. 22 (1979). In both Snyder and Farlow, the Department rejected the applicants' cultivation because they discontinued their efforts long before the time of filing of the applications, in one case 5 years and the other 10 years. The evidence of record clearly shows that is not the situation in the instant case. The photographs show many mature fruit trees with a small vegetable garden nearby in 1982 when the application was filed.

Moreover, contrary to BLM's finding, the Department has not eliminated the planting of fruit trees as a qualifying activity for cultivation. In William S. Archibald, 75 IBLA 236, 240 (1983), concurring opinion of Administrative Judge Burski, the Department's historic treatment of fruit trees was discussed as follows:

Thus, in Ferdinand J. Clifford, 42 L.D. 535 (1913), the First Assistant Secretary held that the planting of fruit trees was cultivation of agricultural crops within the meaning of the general Homestead Act. This ruling was thereafter applied under the Desert Land Act. *See* Samuel D. Block, 45 L.D. 481 (1916).

Although, in this context, the nature of this activity may qualify for cultivation, appellants cannot properly receive credit for any part of that cultivation conducted after they acknowledged they had acquired defective title to the land. The problem is that with the exception of a single tree planted by the Hustons' grantor, every single tree was planted after they were made aware of the fact that the Government laid claim to the land.

Appellants have asserted in their application that they first learned that they did not have clear title to the land in question in July of 1972. <sup>4/</sup> Their abstract of title shows they acquired their deed from the Allens on July 6, 1972. The Fidelity millsite claim was declared null and void in a contest action (S-4385) by a decision of a hearing examiner dated April 4, 1972. Although their predecessors, Ernest E. and Maxine Allen, were not parties to this contest, the other parties, Jack and Vera E. Owens,

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<sup>4/</sup> In response to question 6a on the application "when did you first learn you did not have clear title to the land," they gave the date of July 1972.

Edward J. Linney, and Anthony Silva, had acquired their portions of the millsite claim from the same Allens. The Hustons admit they were aware of the contest action but contend essentially, that since their parcel was not named in the action and was not involved in the hearing, this portion of the millsite claim remained private property. The case file, however, also contains a copy of a letter of January 26, 1973, from Calaveras County informing Mr. Huston that the millsite claim had been canceled and the title was in the United States. Thus, appellants were aware of the title problem no later than this last date.

In Arthur Baker, 64 I.D. 87 (1957), the Department expressly held that "improvements must have been made prior to the time that the applicant became aware of the fact that his title to the land was defective." Id. at 91. The reason for this is obvious. The Color-of-Title Act does not apply merely because someone believes, on the basis of a document running from a party other than the Government, that he has title to land which the Government actually owns. Rather, it requires more. It requires that the putative owner act on his belief by either improving or cultivating the parcel. This serves as an objective manifestation of his good faith belief that he does, in fact, own the land. Once, however, a land owner is advised of the Government's claim to the disputed land, the initiation of either cultivation or improvements no longer serves as an indicator of good faith but must be viewed as a post facto attempt to fit the applicant within the letter of the law. Thus, the cultivation or improvements must pre-date the knowledge of the Government's claim to the land.

On these facts, we must find that appellants' continued planting of fruit and nut trees on a yearly basis after 1972 cannot properly be considered sufficient to meet the cultivation requirement of the statute and regulation. Accordingly, without either qualifying improvements or cultivation, appellants are not entitled to receive this parcel under the Color-of-Title Act.

Therefore, 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.

Anne Poindexter Lewis  
Administrative Judge  
Alternate Member

We concur:

Franklin D. Arness  
Administrative Judge

James L. Burski  
Administrative Judge

