

Editor's note: Reconsideration granted; motion to remand to BLM granted by Order dated Oct. 31, 1986 -- See 93 IBLA 123A & B below.

JEROME L. KOLSTAD

IBLA 85-44

Decided July 28, 1986

Appeal from a decision of the Eastern States Office, Bureau of Land Management, rejecting color-of-title application E-32740 Minnesota.

Affirmed in part and referred for hearing in part.

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

A class 1 color-of-title claim requires good faith and peaceful, adverse, possession by a claimant, his ancestors or grantors, under claim or color of title for more than 20 years. The claim or color of title must be based upon a document which on its face purports to convey the claimed land to the applicant or the applicant's predecessors. When the applicant fails to produce such a document, the application must be rejected.

2. Administrative Procedure: Hearings -- Contests and Protests: Generally

Where BLM never adjudicated a timely protest to the filing of a notice of plat of survey, and the protest disputes the conclusion that a tract of land was an unsurveyed island at the time of the original survey, the protest may be referred for a hearing.

APPEARANCES: Sam A. Aluni, Esq., Virginia, Minnesota, for appellant.

OPINION BY ADMINISTRATIVE JUDGE KELLY

Jerome L. Kolstad appeals from a September 4, 1984, decision of the Eastern States Office, Bureau of Land Management (BLM), rejecting appellant's class 1 application under the Color-of-Title Act, 43 U.S.C. §§ 1068, 1068a, 1068b (1982) (the Act), for purchase of 0.48 acres of land described as tract 51, T. 62 N., R. 16 W., sixth principal meridian, Minnesota. BLM rejected appellant's application because of the applicant's failure to provide "an instrument which, on its face, purports to convey title to the land in issue, creating a chain of title dating back 20 or more years."

BLM's determination was based upon the following evidence:

The applicant alleges that [Tract 51] (also known as "Lot 10, North Addition to Everett Point", via a private survey), is in fact part of Government Lot 2, Sec. 23, T. 62 N., R. 16 W., Fourth Principal Meridian, Minnesota. The records on file in the Eastern States Office indicate that Government Lot 2, Sec. 23 was properly patented to Robert McCoy on October 13, 1891. This conveyance to Mr. McCoy did not include the Tract No. 51 as identified by the Cadastral Survey dated February 9, 1981. Rather, the Branch of Cadastral Survey determined that the island in question was omitted from the original plat of survey dated June 28, 1882.

* * * * *

The applicant has submitted evidence of conveyancing instruments in the application dating back to 1967 which govern "Lot 10, North Addition to Everett Point". The first deed to actually describe "Lot 10" is dated October 13, 1967, wherein Glen V. Shafer and Mary Shafer convey said lot to Ernest A. Hierschbiel and Annegret Hierschbiel. This conveyance was based upon a private survey approved February 24, 1964, by the Plat Commission, St. Louis County, Minnesota. The next entry indicated that the Hierschbiels deeded "Lot 10" to Jerome and Carol Kolstad on April 29, 1978. The applicant has continued to hold the property in peaceful adverse possession to the present. However, Mr. Kolstad lacks evidence of a deed or other writing purporting to convey title to "Lot 10" or the current Tract 51, T. 62 N., R. 16 W., Fourth Principal Meridian, Minnesota, prior to October 13, 1967. [Emphasis in original.]

BLM Decision at 1, 2.

Based on the above evidence, BLM concluded that Tract 51 remains public land and is suitable for application under the Act, but that appellant did not show by evidence of a deed or other writing that the tract was conveyed prior to October 13, 1967. Thus, a chain of title dating back 20 years or more was not shown.

On appeal, appellant asserts "the chain-of-title to the subject property is unbroken from the patent dated October 13, 1891" and that the tract was part of the conveyance of Government Lot 2 to Glen V. Shafer and Mary J. Shafer by warranty deed dated March 7, and filed April 3, 1956. Appellant submits an affidavit of the Shafers stating that when they purchased Government Lot 2, they believed it included Lot 10, North Addition to Everett Point (Tract 51) and that a plat prepared at their request and filed on February 25, 1964, includes Lot 10 as part of Government Lot 2.

[1] Section 1 of the Act, 43 U.S.C. § 1068 (1982), sets forth the requirements that must be met by a claimant in order to receive a patent under the Act:

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 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, or (b) may, in his discretion, 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 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 governmental units, 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: * * *.

A claim under part (a) of this section is defined by the Department as a claim of class 1; a claim under part (b) is defined as a claim of class 2. 43 CFR 2540.0-5(b). Thus, since appellant's application was under a claim of class 1, he must show, inter alia, that Tract 51 "has been held in good faith and in peaceful, adverse, possession by [him], his ancestors or grantors, under claim or color of title for more than twenty years."

In order to satisfy this statutory requirement, he must establish a claim of title of more than 20 years based on a instrument which, on its face, purports to convey title to Tract 51. Carmen M. Warren, 69 IBLA 347, 349 (1982); Anthony T. Ash, 52 IBLA 210 (1981); Marie Lombardo, 37 IBLA 247 (1978). The burden of establishing that the requirements of the Act have been met is clearly upon the appellant. As we stated in Corrine M. Vigil, 74 IBLA 111, 112 (1983):

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. Jeanne Pierresteguy, 23 IBLA 358, 83 I.D. 23 (1975); Homer W. Mannix, 63 I.D. 249 (1956). 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. Lester Stephens, 58 IBLA 14 (1981).

The fact the Shafers believed that when they purchased Government Lot 2 it included Tract 51 does not satisfy the requirements of the Act. As we stated in Marcus Rudnick, 8 IBLA 65, 66 (1972):

In essence, appellant is suggesting that the original claimant * * * intended to encompass the land in issue within his claim. An adverse possession under the Color of Title Act, based entirely on a mistaken belief that the tract is embraced within one's own holdings, is inadequate under the law, since it lacks the basic element of a claim or title derived from some source other than the United States. John Johnson, A-25695 (December 30, 1949). See Christopher A. Merlau, A-26204 (December 18, 1951).

Appellant challenges the holding in the decision below that " * * a basic requirement of a color of title claim is * * a deed or other written instrument purporting to convey title to the land * * ." He states that " * * that was the land that was occupied and had been over 50 years * * with the sincere belief of everyone that this land in question was the land filed on." Such a deed or other writing purporting to convey title and describing the land sought under the application is a sine qua non. Minnie E. Wharton, et al., 79 I.D. 6, 9 (1972). In essence, a color of title claimant must establish, inter alia, that the land in issue was conveyed by an instrument which on its face purported to convey the land in issue. S. V. Wantrup, Wallace Hardin, 5 IBLA 286 (1972); cf. Harold C. Rosenbaum, 79 I.D. 38 (1972). [Emphasis in original.]

Our review indicates BLM was correct in determining the earliest instrument purporting to convey title to Tract 51 is the deed from the Shafers to the Hirschbiels dated October 13, 1967. The tract was earlier identified in a private survey as "Lot 10, North Addition to Everett Point" and appears on a plat approved February 24 and filed February 25, 1964, but a survey which merely identifies land is not an instrument purporting to convey title. See Lena A. Warner, 11 IBLA 162 (1973).

We note that appellant asserts in his color-of-title application that the tract was included in the October 13, 1891, patent to Robert McCoy. While we recognize that some question exists as to whether or not this patent embraced the subject land, this matter is not properly raised in the context of a color-of-title application. See, e.g., Benton C. Cavin, 83 IBLA 107, 109 n.2 (1984). Insofar as a color-of-title application is concerned, an applicant necessarily admits the title to the land is in the United States since, by filing the application, an applicant seeks to have the United States convey actual title to him. Thus, an applicant cannot be heard to assert that his color of title is based on a patent from the Government because, if this were true, the applicant would possess actual title not color of title. It is for this reason that the color of title upon which an applicant bases his or her claim must arise from a source other than the United States. Thus, the patent issued to McCoy cannot serve as a basis for the initiation of appellant's color of title.

Based upon our review of all evidence in this matter, we find appellant failed to show a chain-of-title of more than 20 years based on an instrument which, on its face, purports to convey title to the land in question. We therefore conclude appellant has not met his burden of proof and BLM properly rejected his application under the Act.

[2] There is, however, another aspect of this case which must be addressed. The record indicates on July 3, 1981, appellant received a certified letter from BLM enclosing a copy of a notice of filing of plat of survey. The notice describes islands omitted from the original survey, including Tract 51, and states "[t]he islands described above were found to be over 50 percent upland in character within the purview of the Swampland Act of September 28, 1850 (9 Stat. 519). They are, therefore, held to be public land." The notice advised that the plat would be officially filed on

August 24, 1981, and "all inquiries relating to these lands" should be sent to BLM on or before such date. The notice was published in the Federal Register on July 8, 1981, at 46 FR 35364. On July 21, 1981, appellant filed a letter with BLM stating "[w]e are writing this letter under protest" and requested additional information. Subsequently, appellant's attorney filed letters with BLM on July 10 and August 14, 1981, requesting information. On August 31, 1981, appellant's attorney filed a document entitled "PROTEST" in which appellant asserts that the survey was inaccurate and that appellant, not the United States, has title to Lot 10 (Tract 51).

On November 12, 1981, BLM responded to appellant's attorney detailing the reasons why BLM believed Tract 51 was public land and stated, in reference to appellant's protest filed August 31, 1981, "you may wish to amend your submissions." BLM enclosed for reference the Color-of-Title Act regulations. Eighteen months later appellant filed a letter with BLM on May 12, 1983, stating that since the July 1981 notice, "We have not received any information from your office as to the status of the island that was included in a survey." BLM responded on May 23, 1983, enclosing a copy of its November 12, 1981, response to appellant's attorney and application forms "as outlined under the provisions of the Color-of-Title Act." Subsequently, appellant filed an application under that Act with BLM on August 4, 1983, which was denied by BLM on September 4, 1984, resulting in this appeal.

The above events clearly show appellant timely protested the conclusion that Tract 51 was an unsurveyed island in existence at the time of the 1882 survey. There is no indication, however, that BLM ever adjudicated the protest. BLM's response of November 12, 1981, did not formally deny the protest or provide a right of appeal. In fact, the response appears to suggest that appellant should file a Color-of-Title Act application in lieu of pursuing his protest. We conclude that appellant was entitled to have his protest formally adjudicated and be afforded the right of appeal to this Board under 43 CFR 4.410. Rather than remand this case to BLM for such adjudication, we feel a better procedure in terms of time and fairness is to afford appellant the opportunity for a hearing.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the September 4, 1984, decision of the Eastern States Office, BLM, denying appellant's color-of-title application is affirmed. Pursuant to 43 CFR 4.415, appellant's protest is referred to the Hearings Division for assignment to an Administrative Law Judge who will conduct a hearing and render a decision final for the Department unless appealed pursuant to 43 CFR Part 4.

John H. Kelly
Administrative Judge

We concur:

Wm. Philip Horton
Chief Administrative Judge

James L. Burski
Administrative Judge

October 31, 1986

IBLA 85-44 : ES 32740 Minnesota
93 IBLA 119 :
:
JEROME L. KOLSTAD : Color of Title
:
: Motion to Remand
: Granted

ORDER

By decision rendered on July 28, 1986, this Board affirmed a decision of the Eastern States Office, Bureau of Land Management (BLM), dated September 4, 1984, rejecting appellant's application under the Color of Title Act, 43 U.S.C. §1068 (1982). Jerome L. Kolstad, 93 IBLA (1986). That decision also referred to the Hearings Division an issue protested by appellant but never addressed by BLM, viz., whether Tract 51 was an unsurveyed island in existence at the time of the 1882 survey.

In a motion for reconsideration filed September 11, 1986, counsel for BLM has moved the Board to reconsider its action referring the aforementioned issue to the Hearings Division. In support, counsel cites California Association of 4-Wheel Drive Clubs, 30 IBLA 183 (1977), inter alia. No response to this motion has been forthcoming from appellant although it appears that service has been made on appellant's counsel.

BLM's motion for reconsideration is hereby granted. The casefile will, accordingly, be sent to BLM to adjudicate appellant's protest regarding the survey of Tract 51.

John H. Kelly
Administrative Judge

We concur:

Wm. Philip Horton
Chief Administrative Judge

James L. Burski
Administrative Judge

93 IBLA 123A

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93 IBLA 123B

