

SOTERRA, INC.

IBLA 85-690

Decided February 11, 1987

Appeal from a decision of the Eastern States Office, Bureau of Land Management, rejecting class 2 color-of-title application ES 32756.

Affirmed in part; vacated and remanded in part.

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

BLM properly rejects a class 2 color-of-title application if the applicant fails to submit evidence showing payment of taxes levied on the land for the period commencing not later than Jan. 1, 1901, to the date of application.

2. Color or Claim of Title: Generally -- Color or Claim of Title:
Improvements

Where in a decision rejecting a class 2 color-of-title application BLM observes that the applicant also failed to meet the class 1 requirements because valuable improvements were not placed on the land nor were the lands reduced to cultivation, but the record indicates appellant engaged in forestry practices on such land, the decision will be vacated in part and the case remanded to allow the applicant to submit a class 1 application detailing those practices in support of the position that valuable improvements were placed on the land.

APPEARANCES: J. C. Camp, Esq., Linden, Alabama, for appellant.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

Soterra, Inc., has appealed from the April 30, 1985, decision of the Eastern States Office, Bureau of Land Management (BLM), denying its class 2 color-of-title application (ES 32756) for 40 acres of land described as the SW 1/4 of the NE 1/4, sec. 11, T. 13 N., R. 2 E., St. Stephens Meridian, Alabama.

Soterra filed its application on August 12, 1983. The application included the following information: (1) Soterra had been in possession of

the land since December 20, 1944; 1/ (2) it learned from BLM that it lacked clear title to the land on May 24, 1983; and (3) no cultural and structural improvements are claimed, "other than management of timber thereon." Soterra stated it cut timber from the acreage from 1976 through 1980, using the acreage primarily as a selective cutting area.

Soterra's tax levy and payment report showed tax payments in 1951 and for the years 1955 through 1983. This report provides the following explanation: "All tax records before 1951 were destroyed in a fire which burned our court house, and there are no tax records between the years 1951 and 1955. They also were destroyed by fire. The information above shows the entire assessment which includes this forty acre tract."

On November 27, 1984, Soterra filed with BLM three affidavits in support of its class 2 color-of-title application. In the first, Sammie Daniels, Judge of Probate of Marengo County, Alabama, stated he is custodian of tax sales for delinquency in payment of ad valorem taxes on real estate in the county, and that Soterra and its "predecessors in title have been in possession of said property since December 20, 1944, having purchased same * * * and they have been * * * paying taxes thereon each successive year." The second affidavit, by Franz Plummer, an employee of Greif Brothers Cooperage Corporation from 1944 through 1973, states that Greif Brothers purchased the property in 1944 and from that date through 1973 "practiced timber stand improvement, cutting from said entire tract mature trees, diseased trees, as well as nonproductive trees," and paid taxes on the land during that period. The third affidavit, by Eugene Gibbs, who assumed Plummer's duties in 1973, attests that Greif Brothers conveyed the land to Soterra in 1976, and that Greif Brothers and Soterra, during their respective years of ownership, paid taxes on the land from 1973 through 1984. Both Plummer and Gibbs state that Soterra and its predecessor were unaware that the United States had never granted a land patent on the subject acreage until notice from BLM dated May 24, 1983.

BLM's decision denied Soterra's application stating:

The application submitted by Soterra, Inc., fails to justify a Class 2 claim in that the tax records are not included for the period 1901 - 1950. The application further reflects missing records for the 1952 - 1954 period. 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

1/ Soterra's tax levy and payment report discloses that Greif Brothers Cooperage Corporation, which purchased the subject land for \$800 on Dec. 20, 1944, through consolidation and merger "is now known as Soterra, Inc., Dallas Cooperage Division." The list "Conveyances Affecting Color or Claim of Title," submitted by Soterra in support of its color-of-title application states "Greif Brothers Corp. [formerly Greif Brothers Cooperate [sic] Corp.]" transferred title to the land in question to Soterra by deed dated Mar. 18, 1976.

they have paid taxes levied on the land by State and local governmental units (43 CFR 2540 - 5(b)) [43 CFR 2540.0-5]. The Color-of-Title Tax Levy and Payment Report (Form 2540-3) does not note the payment of taxes for the years specified above. The Color-of-Title Act requires that taxes be paid during the entire period of a claim.

The missing tax records were destroyed by fires in the Marengo County Courthouse. In a November 16, 1984 telephone conversation, Robert A. Jarrell, Office of the Solicitor, Branch of Eastern Resources, advised J. C. Camp, attorney for Soterra, Inc., that affidavits in support of the payment of taxes might meet the requirements for a Class 2 claim. Mr. Camp subsequently submitted three affidavits. The affidavits of Franz E. Plummer and Eugene Gibbs attest only to payment of taxes from 1944. These do not address the payment of taxes between 1901 and 1944. Therefore, these two affidavits do not satisfy statutory and regulatory requirements. The affidavit of Sammie Daniels, Marengo County Probate Judge, states that, to his knowledge, there have been no tax sales of the subject property. The requirement of showing payment of taxes since 1901 contemplates positive evidence that taxes actually have been paid, not merely a presumption. Estate of John C. Brinton, 25 IBLA 286 [vacated in part on other grounds, Estate of John C. Brinton, 71 IBLA 160 (1983)]. In Brinton the Board stated that a State statute which conclusively presumes, in certain circumstances, that taxes had been paid was not sufficient to meet the Class 2 requirements. By analogy a statement that taxes had been paid based on the lack of knowledge of any tax sale does not constitute a positive demonstration of payment. The Daniels' affidavit, therefore, must also be rejected.

The application also failed to meet the requirements of the Color-of-Title Act for a Class 1 claim since no valuable improvements were placed on the property nor were the lands reduced to cultivation. To satisfy the requirements of a Class 1 claim under the Color-of-Title Act, valuable improvements must exist on the land at the time the application was filed, or it must be shown that the land has been reduced to cultivation, Mable M. Farlow, 86 I.D. 22.

In its statement of reasons for appeal, Soterra asserts that "although the tax records were destroyed by fire here in Marengo County, Alabama, the secondary evidence is submitted to prove payment of the taxes * * *." In support of this position, Soterra submitted an affidavit by John C. Ramsey, tax assessor for Marengo County, Alabama, in which he attests that Soterra "has been regularly assessed and the taxes paid thereon by Soterra, Inc., and its predecessors in title as far back as our records go, namely to the year 1951." In addition, Soterra argues that its forestry practices qualify as cultivation under the Color-of-Title Act, 43 U.S.C. § 1068 (1982).

[1] Soterra filed its class 2 color-of-title application pursuant to the Color-of-Title Act, 43 U.S.C. § 1068 (1982), which provides in part:

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 lands 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: * * * And provided further, That no patent shall issue under the provisions of this chapter for any tract to which there is a conflicting claim adverse to that of the applicant, unless and until such claim shall have been finally adjudicated in favor of such applicant. [2/] [Emphasis in original.]

BLM correctly determined that Soterra had no valid class 2 claim, since Soterra failed to show payment of taxes from 1901 through 1950 and from 1952 through 1954. The affidavits submitted by Soterra concerning payment of taxes do not address the payment of taxes from 1901 through 1944, and as the Board stated in Estate of John C. Brinton, 25 IBLA 283, 286 (1976):

[T]he requirement of showing payment of taxes since 1901 contemplates positive evidence that taxes actually have been paid, not merely a presumption. Such requirement was imposed to demonstrate bona fides from January 1, 1901, to the date of filing of the application. The State statutory presumption is not efficacious to establish the bona fides required. [3/]

The destruction of court house records clearly puts appellant at a disadvantage in this case in establishing a class 2 claim; however, the requirement to show payment is a statutory requirement and may not be waived.

2/ Color-of-title claims are classified as class 1 and class 2 claims. They are described in 43 CFR 2540.0-5(b) as follows:

"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 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 governmental units."

3/ As noted, supra, this case was vacated in part on other grounds in Estate of John C. Brinton, 71 IBLA 160 (1983).

[2] As stated, Soterra's color-of-title application was formally submitted under class 2, and BLM correctly rejected that application for failure to meet the statutory requirements for a class 2 claim. BLM also noted that Soterra failed to meet the requisites for a class 1 claim. Allegations made by Soterra, however, indicate the contrary. First, the record shows Soterra or its predecessor in interest has held the land in good faith and peaceful adverse possession for more than 20 years. Moreover, in its application, Soterra stated that it had engaged in the management of timber on the land, but that the land had not been cultivated. The Plummer affidavit stated that from 1944 to 1973, Greif Brothers practiced "timber stand improvement," e.g., removing mature, diseased, and nonproductive trees from the entire tract. In its April 30, 1985, decision, BLM concluded without discussion that Soterra had not placed valuable improvements on the land and had not cultivated the land. However, in Benton C. Cavin, 83 IBLA 107, 121 (1984), we observed "that past actions of a color-of-title applicant relating to silviculture practices may well establish that an applicant has placed improvements on the land as required for a class 1 claimant." See also Ben S. Miller, 55 I.D. 73 (1934). To the extent BLM's decision rejected appellant's application as a class 1 claim, it is vacated and remanded to allow appellant, if it desires, to file a class 1 color-of-title application detailing its forestry practices on the subject land in support of a claim that valuable improvements were placed on the land. ^{4/}

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Eastern States Office is affirmed in part, and vacated in part and the case remanded.

Bruce R. Harris
Administrative Judge

We concur:

Gail M. Frazier C. Randall Grant, Jr.
Administrative Judge

Administrative Judge

^{4/} We note that on appeal Soterra takes "the position that cultivation of this land for the growing of timber is recognized in the State of Alabama as row-cropping as seedlings are planted, fertilized, cultivated, and looked after as an agricultural crop might be. The cultivation of said land is for the sole purpose of production of saw logs, plywood logs and pulpwood." The Cavin case indicates such activities should be considered the placing of valuable improvements on the land.

