

Editor's note: Reconsideration denied by Order dated Jan. 19, 1988

WEATHERSBY GODBOLD CARTER
RICHARD T. HARRISS, III

IBLA 85-746

Decided April 29, 1987

Appeal from a decision of the Eastern States Office, Bureau of Land Management, adjusting purchase price for color-of-title application ES-20149 (Miss.).

Affirmed as modified in part; set aside in part and remanded.

1. Appraisals -- Color or Claim of Title: Appraised Value -- Rules of Practice: Appeals: Generally -- Surveys of Public Lands: Generally

Where, in computing the acreage of a parcel of land for purposes of arriving at its fair market value in a conveyance to a color-of-title applicant, BLM relied on planimetric measurements of the parcel as depicted on older survey plats and field notes and there is evidence the acreage may subsequently have changed through erosion or accretion, the Board will remand the case to BLM for a resurvey to determine the acreage actually existing in the tract on the date of appraisal.

2. Appraisals -- Color or Claim of Title: Appraised Value

The Board will not overturn a BLM appraisal of the fair market value of a parcel of land in a conveyance to a color-of-title applicant where BLM considered the amount of land fit for agricultural use (the highest and best use) in comparing sales of comparable parcels and did not consider the unsubstantiated impact on fair market value of future erosion of the parcel. Fair market value is not controlled by acreage alone, but depends upon difference in use, character, and productivity.

3. Appraisals -- Color or Claim of Title: Appraised Value

A color-of-title applicant is properly accorded an equitable deduction from the appraised fair market value of the claimed parcel of land based on the longevity of the applicant's colorable title figured from the date of acquisition by the applicant to the date good faith possession ceased, as well as an equitable deduction based on the length of the applicant's chain of title.

4. Appraisals -- Color or Claim of Title: Appraised Value

A color-of-title applicant is not entitled to an equitable deduction from the appraised fair market value of the claimed parcel of land based on the increased costs of financing the original purchase due to discovery of a defect in title or any supposed further doubt as to Federal title.

APPEARANCES: William J. Bethune, Esq., Washington, D.C., for appellants; Barry E. Crowell, Esq., Office of the Solicitor, U.S. Department of the Interior, Alexandria, Virginia, for the Bureau of the Land Management.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Weathersby Godbold Carter and Richard T. Harriss, III, have appealed from a decision of the Eastern States Office, Bureau of Land Management (BLM), dated May 24, 1985, adjusting the purchase price for appellants' color-of-title application, ES-20149 (Miss.). On November 8, 1978, appellants filed with BLM a class 1 color-of-title application for 1,060 acres of land situated along the Homochitto River in sec. 28, T. 5 N., R. 2 W., Washington Meridian, Adams County, Mississippi, pursuant to section 1 of the Color of Title Act, as amended, 43 U.S.C. § 1068 (1982). ^{1/} Appellants claimed to have acquired the land, at a purchase price of \$ 151,580, by deed dated March 16, 1973, from Charolais International, Inc., in a chain of title dating from September 16, 1868. Appellants asserted that they had cultivated 600 acres of the land from 1973 to 1978 and made improvements valued at \$ 204,490. Appellants claimed they first learned that they did not have clear title in September 1973 from Claude Pintard, Jr., and Graham H. Hicks.

By memorandum dated March 2, 1979, the Chief, Division of Lands and Minerals, requested the Geological Survey (Survey) to provide a mineral report with respect to sec. 28. Survey responded by memorandum dated May 10, 1979, that, with the exception of oil and gas, the land was not known to contain minerals "of [a] commercial nature." In order to determine whether appellants' application complied with the statutory prerequisites for a color-of-title claim, BLM then prepared a land report, dated May 30, 1980. The land report recommended approval of appellants' application, with a reservation of oil and gas to the United States. The land report, at page 5, also recommended that "a cadastral survey be requested to determine the actual acreage of the tract to be conveyed." The Chief, Division of Lands and Minerals, and the Chief, Branch of Field Operations, concurred in the land report recommendations in July 1980.

^{1/} Priv. Law No. 95-18, 91 Stat. 1656 (1977), authorized the Secretary of the Interior to consider appellants' color-of-title application without regard to the 160-acre limitation on such applications set forth in 43 U.S.C. § 1068 (1982). Appellants had previously filed a color-of-title application on June 28, 1976, which application was returned by BLM on Oct. 26, 1976, because of the 160-acre limitation.

By memorandum dated July 24, 1980, the Chief, Branch of Lands, requested the Chief, Division of Cadastral Survey, for a report "as to the acreage of the * * * land [in sec. 28], as determined from your review of the official plat of survey and related field notes." The Chief, Division of Cadastral Survey, responded by memorandum dated October 1, 1980, that "an accurate acreage cannot be determined" because the "original field notes are not on file in Eastern States."

On August 26, 1981, the Chief, Branch of Lands Adjudication, requested the Chief, Division of Appraisal, for an appraisal of the surface and mineral estates of sec. 28. 2/ The request stated: "As the exact acreage has yet to be determined, it is requested that your appraisal be computed in value per acre, as opposed to one lump sum."

The appraised fair market value of sec. 28 is set forth in an appraisal report, prepared February 18, 1982, and approved February 22, 1982. The report determined the fair market value of sec. 28 as of January 29, 1982, using the comparable sales appraisal method. Sec. 28, which was considered to have a highest and best use for agriculture, was compared with six other sale parcels of land, considering differences in time, size, access, physical characteristics and potential soil productivity. The report concluded that the per acre fair market value of sec. 28 was \$ 570. The report also devised a recommended purchase price for sec. 28, starting from a fair market value of \$ 527,820, given a 926-acre parcel of land, and subtracting out the value of certain equitable "factors," including appellants' original purchase price (Appraisal Report at 31). The resulting recommended purchase price was \$ 55,684.

By memorandum dated July 27, 1982, the Chief, Branch of Lands and Title Adjudication, again requested the Chief, Division of Cadastral Survey, for the "acreage" in sec. 28. The record indicates that BLM obtained from the State of Mississippi copies of an April 30, 1847, survey plat of the township and field notes for an 1846 resurvey by Henry C. Daniel of portions of Township 5 North. By memorandum dated September 2, 1982, the Chief, Branch of Lands and Title Adjudication, modified his request: "[I]n light of the fact that the actual acreage for the subject tract cannot be determined from the field notes and plats of record with the State of Mississippi, it is requested that a resurvey of said land be conducted by your office." The Chief, Division of Cadastral Survey, responded in a November 12, 1982, memorandum that the "necessary resurvey has been assigned to be executed under Group 23, Mississippi," and would be initiated in February 1983. The resurvey was never undertaken. However, by memorandum dated June 7, 1983, the Deputy State Director for Cadastral Survey responded that the acreage of sec. 28 had been determined from the "official" 1847 township plat to be 1,070 acres. The 1847 township plat was considered by the Deputy State Director for Cadastral Survey to be the "only remaining record of the official survey," because the field notes obtained from the State did not cover sec. 28. In an

2/ By letter dated Aug. 26, 1981, appellants notified BLM that they did not claim the mineral estate of sec. 28. Therefore, by memorandum dated Aug. 31, 1981, the Chief, Branch of Lands Adjudication, amended his request providing for an appraisal only of the surface estate.

October 21, 1982, letter to BLM, appellants offered to undertake a "private land survey at their own expense," in order to expedite processing of their color-of-title application. Appellants have submitted no such private survey.

By letters dated October 21, 1982, and May 23, 1983, appellants also raised a number of objections to BLM's recommended purchase price for sec. 28, set forth in the February 1982 appraisal report. In its May 1985 decision, BLM responded to each of appellants' objections, concluding that the purchase price for sec. 28 should be \$ 47,782, rather than \$ 55,684 because of an adjustment in one of the equitable "factors." Appellants have appealed that decision. They have also requested an opportunity for oral argument. We, however, conclude that the relevant issues have been adequately explored in the parties' written submissions. The request for oral argument is denied.

[1] The first question is whether BLM used the proper acreage figure for sec. 28 in computing the purchase price. Appellants contend in the statement of reasons (SOR) for their appeal that BLM has never accurately determined by survey or otherwise the current acreage of sec. 28. ^{3/} They request a hearing to resolve this issue. BLM responds in answer that BLM determined the acreage of sec. 28 by applying a planimeter to the official survey plat. BLM asserts that the resulting acreage figure (1,070) was reported in the June 1983 memorandum of the Deputy State Director for Cadastral Survey. BLM contends that the accuracy of this acreage figure is verified by "several pieces of evidence." BLM refers first to a March 31, 1980, letter to Harriss from Everett Truly which states that Bob Hammack had concluded the original survey field notes indicated that sec. 28 contains 926 acres "instead of the 1,060 acres which was shown on the township plats." (Emphasis added.) BLM next refers to a September 7, 1972, BLM decision with respect to an oil and gas lease offer (ES-5446 (Miss.)) for sec. 28 which states that the area "has been computed from the boundaries of the tract shown on the plat and has been established as approximately 1059.20 acres." The lease case file indicates that BLM then also relied on the 1847 township plat to compute the acreage of sec. 28. BLM concludes that, in the absence of proof by appellants that the "official acreage no longer reflects the acreage of the tract," the purchase price for sec. 28 should be "recalculated based upon the 1,060 acres" (Answer at 8, 9). ^{4/}

^{3/} Appellants assert that they revised their original acreage calculation from 1,060 acres to 926 acres, because of erosion which had occurred on the southern boundary of sec. 28 along the Homochitto River. Appellants refer to an Apr. 10, 1980 letter to BLM in which Harriss states: "You will note that the number of acres is 926 instead of 1060. I am sure that an additional 25 to 50 acres have been taken by the river since that survey was made over twelve years ago." In its May 1985 decision, BLM concluded that appellants requested that BLM "compute the purchase price for sec. 28 based on an acreage of 926 acres." We can find no such request. On the contrary, as noted, Harriss has argued for an acreage figure "25 to 50 acres" less than 926 acres.

^{4/} BLM adjusted the 1,070-acre figure in the June 1983 memorandum of the Deputy State Director for Cadastral Survey to account for a 1 percent margin of error "expected" with planimetric measurements (Answer at 7).

However, in conjunction with a reply brief, appellants offer evidence that the actual acreage in sec. 28 is considerably less than 1,060 acres and that the Homochitto River has eroded the southern boundary of the section. Appellants submit a November 13, 1985, report signed by R. L. Hammack, Chief, Surveying Section, Jordan, Kaiser and Sessions, a firm of consulting civil engineers. The report states that the acreage of sec. 28 has been determined using the field notes of an 1806 survey of sec. 28 by a "U.S. Deputy Surveyor," which notes were obtained from the Chancery Clerk, Adams County, Mississippi (Report at 2). The report, at page 2, states that this was the "first and only survey by U.S. Deputy Surveyors of Section 28," and affirms the statement in the June 1983 memorandum of the Deputy State Director for Cadastral Survey that the 1846 resurvey by Daniel did not cover sec. 28.

At the time of the 1806 survey, sec. 28 was purported to be encompassed in the private land claim of one George Rapalje. That name appears in the 1806 field notes, as well as on the 1847 township plat. The report, at page 3, states that "Section 28 was found to contain 894 acres." Hammack states in the report that he had originally informed Truly that sec. 28 contains 926 acres using the 1806 field notes, but corrected that figure after retabulating the river meanders, given in the notes "in [their] proper order" (Report at 3). The report contends that BLM improperly relied on the 1847 township plat which purportedly depicted the 1806 field notes. The report also states that the plat was a compilation of surveys of individual private claims and was intended to represent the "relationships [between claims] rather than of accurately plotted survey notes." Id. at 2.

With respect to bearings around sec. 28, the 1806 field notes do not match the 1847 township plat. The report also states that a comparison of an "October 1983 aerial photograph" of the section and an overlay of the 1806 field notes reveals that 44 acres have been lost to erosion since the 1806 survey. Id. at 3. The report acknowledges a 40-acre accretion "near the southwesterly part of Section 28," but argues that the accretion should be considered part of the river channel. Id. The report concludes that sec. 28 contains 850 acres.

In a motion opposing appellants' request for a hearing, BLM contends that it considered the 1806 field notes in determining the acreage of sec. 28 but concluded that the notes were of "little probative value" because there was no evidence that they are U.S. Government field notes. ^{5/} BLM states that, in any case, it calculated the acreage from the 1806 field notes as 926.6 acres. Also, BLM states that the "first official plat" of sec. 28, signed by Surveyor General Freeman, who served from 1810 to 1820 (Freeman plat), indicates that sec. 28 contained 1,070.9 acres at the time of that

^{5/} BLM points out that the 1806 field notes were not signed by a U.S. Deputy Surveyor and that the notes state that the land was surveyed "for" the private land claimant, George Rapalje (Exh. 2, Motion). BLM concludes that the notes probably reflect a "private survey" (Motion at 3).

plat, 6/ and that the 1847 township plat indicates that the section contained 1,087.9 acres owing to subsequent accretion. BLM also states that it has compared the 1847 township plat and a 1958 Survey quadrangle map in order to assess the effect of erosion after 1847. BLM states that this comparison shows "very little change" (Motion at 5). BLM calculated the 1958 acreage at 1,079.7 acres. The 1958 quadrangle map contains the lines for sec. 28. However, there is no indication from which survey those lines were derived. Moreover, the map was not prepared by Cadastral Survey and as such does not purport to be an accurate depiction of an official survey. Benton C. Cavin, 83 IBLA 107, 131 (1984). It is primarily intended to depict the topographic features of the land. We do not view it as an appropriate basis for reliably calculating the acreage of sec. 28.

Based on all the evidence adduced by both parties, we are unable to resolve the question of the proper acreage figure for purposes of computing the purchase price of sec. 28. At a minimum, both appellants and BLM agree that the acreage of sec. 28 has changed to some degree over time, whether by erosion or accretion. This change in the configuration of sec. 28, primarily along the southern boundary, belies any reliance on survey plats or field notes dating from the early 1800's. 7/ We conclude that BLM is obligated to reliably determine the acreage of sec. 28 by virtue of the Department's obligation under section 2 of the Color of Title Act, 43 U.S.C. § 1068a (1982), to appraise the value of the land sought in a color-of-title application as of the date of appraisal. The "value" of land clearly cannot be determined unless BLM has determined the acreage involved. The most reliable way to determine the acreage of sec. 28 as of the date of appraisal is by a resurvey.

There is some question as to which was the original survey, the 1806 survey, or the survey shown on the Freeman plat. BLM contends that the 1806 survey was not a U.S. Government survey. The record indicates the only evidence available to BLM of that survey was an 1806 survey plat which is not signed and which bears no notation indicating by whom it was prepared. 8/ On the other hand, appellants have submitted copies of portions of field notes which agree with the 1806 survey plat in terms of bearings and distances along the section lines, including the river. These field notes cover the

6/ We fail to see how BLM derived an acreage figure from the Freeman plat which was attached to BLM's motion, since there are no reported bearings and distances or any scale on the plat. However, the record contains another Freeman plat which contains the same bearings and distances as on the 1847 township plat. The acreage figure was presumably derived from this plat.

7/ Moreover, we note that BLM has revised its calculation of the acreage of sec. 28 even during the course of this proceeding. In its answer, relying on the 1847 township plat, BLM stated that the acreage was 1,060. However, in its motion opposing hearing relying on the 1958 quadrangle map, BLM has revised this figure to 1,079.7 acres.

8/ Reliance on the Freeman plat is made difficult by the fact that, according to BLM, there are no existing field notes for the survey purportedly reflected on the plat.

township boundaries and certain "Private Claims." There are no title, signature or approval pages included in appellants' submission. Before conducting a resurvey, BLM would have to verify that the field notes are from an official survey. However, assuming that the field notes reflect an official survey, it is clear from the field notes that the western, northern and eastern boundaries of sec. 28 do not fit with the corresponding boundaries given for the adjoining secs. 11, 16, 22 and 27. ^{9/} This presumably explains the apparent alteration of bearings by the drafters of the 1847 township plat, as well as of the earlier Freeman plat, in order to achieve a proper fit between the claims.

Even assuming that 1806 was the date of the first U.S. survey plat, the second survey, whether it be shown by the Freeman plat of survey or the 1847 plat of survey, would take precedence over the first. While it is true that those who take under an early survey cannot have their rights adversely affected by a later survey, this has no relevance to this appeal, since appellants' chain of title does not begin until 1868. In Benton C. Cavin, supra, we rejected a request for a survey in that case by finding that "rights under the Color of Title Act are necessarily limited to the land actually described." Id. at 131 (Emphasis in original). The survey request in that case, however, was not based on uncertainties in the amount of acreage described, but rather was generated by a conflict concerning the situs of the parcel in relation to some of the appellant's improvements. In Cavin we stated that "regardless of the limits of the land which appellant may have occupied, his claim can embrace only such land as constitutes the NE 1/4 NE 1/4, established pursuant to the 1874 survey."

In this case, however, while it is clear that sec. 28 is comprised of lands north of the Homochitto River bounded by sec. 22 on the west, sec. 16 on the north and secs. 11 and 27 on the east, the possible erosive and accretive actions of the Homochitto have resulted in a present parcel that, along its southern boundaries, varies considerably from that shown on any of the 19th century plats. We believe that where a color-of-title applicant seeks land riparian to a meandered water body and the evidence indicates that either substantial accretion or erosion occurred since the last survey, the value of the parcel must be adjusted to take into account such acreage additions or subtractions as have occurred. Cf. 43 CFR 3111.2-3 (providing that an oil and gas lease offer which includes accreted lands must specifically describe those lands by metes and bounds).

We, therefore, set aside the May 1985 BLM decision and remand the case to BLM for a resurvey of sec. 28 and a recalculation of the appraised fair market value of the land.

^{9/} The field notes also indicate that the 1847 township plat does not consistently refer to the same private claimant indicated in the notes. This may explain early confusion, evident in the case of Georgette B. Lee, 5 IBLA 295 (1972), involving oil and gas lease ES-5446 (Miss.), as to whether George Rapalje's apparent private claim to sec. 28 had been confirmed. The confusion probably arose as a result of the fact that the field notes erroneously associated sec. 28 with George Rapalje, which association was carried through to the 1847 township plat.

[2] Appellants next contend that a portion of the land in sec. 28 is not fit for agricultural use "because it is contaminated by salt water, traversed by ditches, covered by sand bars, and susceptible to flooding throughout the year," and should not have been so valued for highest and best use purposes (SOR at 10). In response to this argument, BLM argues that, while sec. 28 was considered to have a highest and best use for agriculture, the BLM appraiser took into account the fact that not all of the land was fit for agricultural use in determining its fair market value. We agree.

The BLM appraisal is based upon analysis of comparable sales in the vicinity of sec. 28. The appraisal report, at page 5, indicates that the appraiser was aware that not all of the land in sec. 28 is fit for agricultural use:

An estimated 875 acres have been cleared of cut-over timber. The remaining acreage consists of small pockets of brush and trees left to stabilize the banks of the Homochitto River. Sammy Creek, Lynn Creek, and Chase Bayou cross the property and have been straightened and deepened to improve surface drainage. All 875 acres is annually planted in soya beans.

The conclusion that sec. 28 has a highest and best use for agriculture establishes the predominant use for most, but not all, of the land within a given parcel. It is useful for initially selecting other parcels for comparison purposes. Pacific Power & Light Co., 65 IBLA 50, 54 (1982); Western Slope Gas Co., 61 IBLA 57 (1981).

However, a proper appraisal using the comparable sales approach will then take into account the actual differences between the parcels in terms of the acreage available for that use. See Byron R. Meyer, 89 IBLA 219, 221-22 (1985). It is clear that the appraisal here took those differences into account when comparing the parcels with respect to physical characteristics and potential soil productivity. We, therefore, find no need to undertake a hearing to determine the extent of the acreage unfit for agricultural use, as requested by appellants.

Appellants next contend that BLM failed to consider the fact that land along the Homochitto River which is subject to future erosion "should be valued at less than upland acreage" (SOR at 10). BLM contends that the future effect of erosion has no bearing on the fair market value of sec. 28 as of the date of appraisal and that, in any case, appellants have not established that erosion is occurring.

It is not correct that the future impact of erosional forces has absolutely no bearing on the present fair market value of a parcel of land. The degree to which such forces have a bearing will depend on the likelihood and severity of any future impact. However, the potential for erosion clearly can affect fair market value in the same way that the potential for landslides, flooding and earthquakes affects the fair market value of land susceptible to such forces. Taking this potential into account is consistent

with the dictate of the Uniform Appraisal Standards for Federal Land Acquisitions, Interagency Land Acquisition Conference, 1973 (UAS), at page 10, that the comparable sales appraisal method must consider "all matters which have an effect on market value pertaining to relative desirability." Nevertheless, appellants have not demonstrated that the likelihood and severity of any future impact of erosion is such that it presently affects the fair market value of sec. 28. It is equally possible that in the future land will be added to sec. 28 by accretion. Therefore, we conclude that BLM's failure to make an adjustment for this factor was justified.

[3] Appellants next contend that BLM has not properly considered certain equitable factors which would lower the "purchase price" for sec. 28 (SOR at 11). Section 2 of the Color of Title Act requires that the Secretary in appraising land "shall consider and give full effect to the equities of * * * [the] applicant." 43 U.S.C. § 1068a (1982); see also 43 CFR 2541.4(a). Such "equities" have the effect of reducing the appraised fair market value which would otherwise be charged the color-of-title applicant. In Benton C. Cavin, supra at 126, quoting from Ralph Dickinson, 39 IBLA 258, 262 (1979), we enunciated various equitable factors recognized by the Board, namely the amount paid by the applicant for the land, the longevity of the applicant's colorable title, whether the applicant and his grantors paid fair market value for the land, the degree of reasonableness of the applicant's belief in good title, the length of the applicant's chain of title, how the errors relied upon to initiate the chain of title arose, any payment of taxes and "any other factors which, in a spirit of fairness, a court of equity would recognize." In Cavin, we also noted that the Eastern States Office had developed a system for quantifying equities by assigning a maximum 16.7 percent deduction from fair market value for each of the enumerated equitable factors, with the exception of the amount paid by the applicant for the land and "other factors." The amount paid would be taken as a straight deduction from the appraised fair market value and "other factors" would constitute an "additional deduction." Benton C. Cavin, supra at 128. We stated that this system constituted a "useful and workable framework" for dealing with equities. Benton C. Cavin, supra at 128. Although that approach is not the only acceptable approach, we will apply it here. Id.

The appraisal report specifically considered, in recommending a purchase price, each of the equitable factors outlined in Cavin, assigning a full 16.7 percent deduction for each of the six specific equitable factors, with the exception of the longevity of appellants' colorable title. With respect to the longevity of appellants' colorable title, the BLM appraiser assigned a 1.7 percent deduction because appellants' "claim dates back to 1978," or approximately 4 years prior to the date of the appraisal (Appraisal Report at 32). No deduction was assigned for "other factors." The total deduction was 85.2 percent. This deduction was applied against the appraised fair market value \$ 527,820 or \$ 570 per acre for 926 acres, after deducting the purchase price paid by appellants (\$ 151,580). The resulting figure was the recommended purchase price of \$ 55,634.

By letter dated October 21, 1982, appellants argued that the deduction for the longevity of appellants' colorable title should be 3.8 percent, measuring 9 years "from date of purchase (1973) to date of appraisal report (1982)."

In its May 1985 decision, BLM adopted appellants' approach, thereby providing for a 3.8 percent deduction for the longevity of appellants' colorable title. The total deduction was revised to 87.3 percent. BLM, therefore, recommended a revised purchase price of \$ 47,782.

Appellants contend on appeal that BLM has not properly assigned a deduction for the longevity of appellants' colorable title. In assigning this deduction, BLM used a modified version of the BLM approach discussed in Cavin. In Cavin, we stated that the Eastern States Office had adopted an approach by which it assigned a full 16.7 percent deduction "in any situation in which the claimant had occupied the land in excess of 40 years, prior to application." Benton C. Cavin, supra at 128 (emphasis in original.) We corrected BLM's approach discussed in Cavin to recognize that the equitable concern is the length of time that an applicant has held colorable title to the land in good faith. Therefore, the question is the length of time between the date of the applicant's acquisition of the land and "the date [the] applicant was informed of the claim of the United States to the land." In the present case, appellants acquired sec. 28 in March 1973 and, according to their application, became aware that they did not hold clear title in September 1973. Accordingly, in its answer, BLM argues for a deduction for the longevity of appellants' colorable title based on 1 year, or 0.4 percent. We agree.

We also stated that we "[did] not quarrel with the assumption that 40 years or more gives rise to a full deduction for this equity." Benton C. Cavin, supra at 128. On appeal, appellants contend that there is no "justification" for the "40-year standard" (SOR at 18). That standard is admittedly a matter of policy. It is justified simply by the fact that it provides a useful and workable basis for determining when a color-of-title applicant is entitled to the full 16.7 percent deduction from the appraised fair market value of the claimed land. We see no reason to depart from that standard.

Appellants argue that BLM should also take into account the length of time from a 1940 flood control easement when the United States acted "as if it were a stranger to legal title" until a final BLM decision on the purchase price (SOR at 18). As BLM found, we can discern no actions by appellants after 1940 which necessarily gave rise to any "equities" so far as this pending color-of-title matter is concerned. Merely holding the land until BLM could adjudicate and then evaluate appellants' color-of-title claim will not suffice. Id.

Another factor is the length of appellants' chain of title. As outlined in Cavin and adopted by the Board herein, the approach by the Eastern States Office is to allocate a full 16.7 percent deduction for a 100-year chain of title and a proportional percentage deduction for any lesser amount of time. In its appraisal report, BLM assigned a full 16.7 percent deduction, based on a chain of title running from 1876 to 1982, i.e., the date of the appraisal. However, in Benton C. Cavin, supra at 129, we modified BLM's approach so that the length of a chain of title would run from the date "color of title arose" to the date the applicant "was informed of the Federal claim of ownership." BLM now argues in its answer, at page 21 n.8, that appellants'

color of title arose in 1877, not 1868 (as appellants' color-of-title application stated), because "the evidence shows no conveyance out of the 1868 grantee." Accordingly, BLM seeks to modify the 16.7 percent deduction to 16.2 percent. Appellants contend that an "unbroken chain of title begins in 1868" and that BLM has simply misread their application. The certified list of conveyances attached to appellants' application, indeed, shows an April 14, 1877 conveyance from a special commissioner acting for the "1868 grantee" to Willina Wright. Therefore, we conclude that appellants' color of title arose with the prior September 16, 1868 conveyance to William Holliday. The result is a chain of title well in excess of 100 years. Appellants are entitled to the full 16.7 percent deduction.

[4] Neither BLM nor appellants dispute the other equitable factors specifically set forth in Cavin, for which BLM assigned a full 16.7 percent deduction in its appraisal report. However, appellants contend that other "equities" should be taken into account in mitigation of the purchase price.

Appellants argue that the Department should first consider the fact that they were unable to acquire favorable permanent financing for their purchase of sec. 28 as a result of discovery of the defect in title, and have since been paying higher interest charges pending BLM adjudication of their color-of-title application. Appellants state that the Connecticut Mutual Life Insurance Company (Connecticut Mutual) withdrew a June 25, 1973, commitment for permanent financing at 8 percent because of the defect in title and that appellants have, since 1973, been forced to get temporary financing at less favorable rates. Appellants state that for the period 1974 through 1982 they paid approximately \$ 75,000 more in interest than if they had secured the 8 percent financing. BLM, in its answer, at page 15, questions whether appellants had a "firm commitment" from Connecticut Mutual in June 1973, or simply an outstanding loan application. Even if we accept that appellants had a firm commitment, this does not alter the result reached by us.

In Benton C. Cavin, *supra* at 129, we disallowed any equitable deduction for the "payment of mortgages which [the applicant] had placed on the property." We affirm that position. A color-of-title applicant is allowed a deduction for the full amount of his or her original purchase price. However, we will not distinguish between those applicants who originally paid in cash and those who financed their original transactions by according the latter an additional deduction. To do so would not only prejudice those who paid in cash but ultimately most benefit those who financed their original purchase under the least favorable terms or those, like appellants, who purchased without the benefit of permanent financing and then were unable to obtain such financing at favorable rates when the defect in title was discovered. Such a system would not properly take into account the "equities" of color-of-title applicants. Rather, it would often force the United States to bear the burden of an applicant's imprudent behavior by suffering the loss of a portion of the appraised fair market value. We do not believe this is what Congress intended in the Department's valuation of color-of-title parcels. Aggrieved applicants should instead look to their original grantors or private title insurers for reimbursement for any such losses. Appellants have requested a hearing to address the amount of increased financing costs incurred as a result of discovery of the defect in title. However, appellants are not entitled to a deduction for such costs, regardless of the amount.

Appellants next argue that the Department should consider the fact that the title of the United States to sec. 28 is "not clear from doubt" and that in 1940 the United States "credited the false chain of private title" by accepting an easement for flood control purposes (SOR at 14, 16). We recognize that the United States has in the past not asserted clear and unmistakable title to sec. 28. The record contains an April 9, 1940, letter from the Commissioner, General Land Office, informing the District Engineer, War Department, that sec. 28 was covered by an 1805 certificate confirming the private land claim of George Rapalje. Appellants' application refers to a December 16, 1940, flood control easement granted to the United States. More recently, in Georgette B. Lee, supra at 297, decided April 13, 1972, we vacated a BLM decision rejecting an oil and gas lease offer for section 28 because the land was not public land, but remanded the case to allow BLM to issue a lease with a stipulation that "federal title to the oil and gas deposits is not clear."

However, in a March 23, 1977, letter to the Chairman of the House Committee on Interior and Insular Affairs, the Secretary, commenting on H.R. 1403 (which became Priv. Law No. 95-18), stated that, despite the earlier confusion, "we consider sec. 28, township 5 north, range 2 west, as public domain land, title to which is still vested in the United States." There is no question that the United States is now regarded as the holder of title to sec. 28. Therefore, in establishing the purchase price for sec. 28, no additional deduction is appropriate because of any supposed doubt as to Federal title. With respect to appellants' assertion that an additional deduction is necessary to account for the fact that the United States "credited the false chain of private title," that circumstance is taken into account under the equitable factors which concern how the errors relied upon to initiate the chain of title arose, and the degree of reasonableness of the applicant's belief of his good title. The appraisal report, at page 32, indicates that appellants were allowed the full 16.7 percent deduction in each case because it was unclear "who was [initially] at fault" and appellants thereafter reasonably believed, having relied on the advice of their attorney, that they had good title. These two factors encompass not only the initial errors which gave rise to the "false chain of private title" but also all that perpetuated that chain. Moreover, we have repeatedly held that an applicant for color of title admits that actual title is in the United States and an alleged uncertainty as to the title of the United States cannot serve to increase an applicant's equities. See Benton C. Cavin, supra, at 126 n.26.

Accordingly, we conclude that appellants are entitled to a total 83.9 percent deduction from the appraised fair market value of sec. 28, when that value is finally determined. 10/ In this respect, the May 1985 BLM decision

10/ At the conclusion of its answer, BLM requests the Board to remand the case so that appellants can be required to prove that they improved and cultivated sec. 28 prior to the time that they became aware that they did not have clear title, as required for a valid class 1 color-of-title claim. See Malcolm C. Huston, 80 IBLA 53, 59 (1984). BLM asserts that appellants may have acquired such knowledge "as early as June 1973" (Answer at 24).

is affirmed as modified. The appraised fair market value of sec. 28 will be determined after an adequate resurvey of the acreage in sec. 28 has been accomplished. In this respect, as noted supra, the May 1985 BLM decision is set aside and the case is remanded for a recalculation of the appraised fair market value of sec. 28.

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 as modified in part and set aside in part and the case is remanded to BLM for further action consistent herewith.

Franklin D. Arness
Administrative Judge

We concur:

James L. Burski
Administrative Judge

John H. Kelly
Administrative Judge

fn. 10 (continued)

We are not convinced that there is any reason to question appellants' statement in their application that they did not become aware of the title problem until September 1973. In addition, appellants submit an Oct. 31, 1985, affidavit of Harriss in which he states that appellants purchased sec. 28 "as part of a larger tract called Washaway Plantation" and "immediately began clearing the land for agricultural use." (Exh. C, Reply Brief, at 1). He further states that between March and September 1973 appellants incurred clearing costs of \$ 117,500 with respect to sec. 28. We also note that in the land report, at page 5, BLM concluded that appellants had "complied with * * * cultivation requirements of a Class 1 Color-of-Title claim." While BLM may revisit this question, should it find it necessary to do so, it should also consider whether appellants have qualified under either of the two provisions of the Color of Title Act (class I or class II) when making its determination.