

Appeal from a decision of the Eastern States Office, Bureau of Land Management, rejecting color-of-title application ES-32835.

Affirmed as modified.

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

The Department cannot grant a color-of-title application for land that was patented and is no longer public land.

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

One who files a Class 2 color-of-title application is required by 43 U.S.C. § 1068(b) (1982) to establish, inter alia, that the tract applied for has been held in good faith and in peaceful, adverse, possession by the claimant, his ancestors or grantors, under claim or color of title for a period commencing not later than Jan. 1, 1901, to the date of application during which time they have paid taxes levied on the land by State and local governmental units. The statute does not give BLM the authority to grant a Class 2 application where there is no evidence the lands applied for were included in lands conveyed to the applicants.

APPEARANCES: Charles H. Andresen, Esq., Duluth, Minnesota, for appellants; Mary Katherine Ishee, Esq., Office of the Solicitor, Washington, D.C., for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE KELLY

Wilbur C. Nemitz, Robert W. Nemitz, and Marlene Kadrie have appealed a July 16, 1985, decision of the Eastern States Office, Bureau of Land Management (BLM), rejecting their class 2 application under the Color-of-Title Act,

(the Act) 43 U.S.C. §§ 1068, 1068a, 1068b (1982). Appellants applied to purchase land in Cook County, Minnesota, which they describe as follows in their application: "Lot 3, Government [Lot] 11 omitted lands, sec. 15, T. 62 N., R. 1 E., fourth principal meridian, 29.75 acres."

We first address the background of the lands in issue. The original 1880 plat of township 62 shows lot 3, sec. 15 as containing 29.75 acres. The eastern and southeasterly boundary of the lot is the meander line of Elbow Lake. On October 6, 1883, the United States issued a patent to lot 3 to the State of Minnesota pursuant to the Swamp Lands Act, as amended, 43 U.S.C. §§ 981-986 (1982). Appellants acquired lot 3 by quit claim deed dated July 18, 1961. An April 27, 1981, plat representing the dependent resurvey of township 62 depicts lot 3 with some variation in the configuration of Elbow Lake when compared to the earlier plat. A note on the plat explains that "material differences" were found to exist between the record meanders and the actual shorelines. A further plat entitled Extension Survey of Omitted Lands and Partial Subdivision (approved October 12, 1982) shows lot 11 (10.59 acres) as being within the "fixed and limiting boundary" which is the boundary shown to be the meander of Elbow Lake on the 1880 plat. A marginal note on the October 12, 1982, plat states in pertinent part:

This plat represents an extension survey, the reestablishment of a portion of the record meander lines and the survey of a portion of the new meander lines of Elbow Lake to include lands omitted from the original survey in sections 10, 11, 14, and 15 and a partial subdivision of section 14, T. 62 N., R. 1 E., Fourth Principal Meridian, Minnesota. The township and subdivisional lines are as shown on the plat accepted April 27, 1981.

Except as indicated hereon, the lottings and areas are as shown on the plat approved January 29, 1880.

The position of the original meander courses of sections 10, 11, 14, and 15 are shown by irregular lines with numbered angle points. These lines, as originally surveyed, were grossly in error and a portion now function as a fixed and limiting boundary. The directions and lengths of the several courses have been adjusted to the record of the original survey.

The field notes for the extension survey indicate that the acreage designated lot 11 resulted from a "reestablishment of a portion of the record meander lines and the survey of a portion of the new meander lines of Elbow Lake to include lands omitted from the original survey."

In its July 16, 1985, decision, BLM rejected appellants' application as to lot 3 because the land was patented and no longer public domain. As to lot 11, appellants' application was rejected because appellants failed to provide a deed or other document which purports to convey title to the lot, and failed to show a chain of title and payment of taxes commencing January 1, 1901.

In their statement of reasons, appellants contend that by issuance of the 1883 patent, the United States intended to divest itself of all lands along the shoreline in sec. 15 and that the creation of lot 11 by the 1982 survey is inconsistent with this original intent. They argue that the original patent to lot 3 contains a latent ambiguity and should be reformed to include the acreage in lot 11. As to the chain of title and payment of taxes, appellants assert their chain of title to both lots originates with the 1883 patent to the State of Minnesota and argue that since taxes were not levied on the lands until 1911, they have satisfied the requirements of the Act. Appellants assert it is impossible to provide a deed conveying lot 11 because the lot was not in existence prior to the 1982 survey.

In its answer, BLM asserts that when lot 3 was patented to the State of Minnesota in 1883, such action precluded conveyance of lot 3 under the Act. BLM agrees that it is impossible for appellants to provide a deed purporting to convey lot 11, but argues that appellants are entitled to submit extrinsic evidence to show the land described as lot 11 was conveyed and have failed to produce such evidence.

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. See 43 CFR 2540.0-5(b). Thus, since appellants' application was under a claim of class 2, they were required to establish that the lands applied for have been held under color or claim of title for a period commencing not later than January 1, 1901, to the date of application, during which time they paid taxes levied on the land by State and local governmental units.

[1] BLM's rejection of appellants' application as to lot 3 was correct. As previously indicated, the United States issued a patent to lot 3 to the State of Minnesota on October 6, 1883. The Department cannot grant a color-of-title application to land that was patented and is no longer public land.

James E. Gaylord, Jr., 94 IBLA 392 (1986); Paul H. & Fay L. Sleeper, 22 IBLA 318, 320 (1975). As we stated in Jerome L. Kolstad, 93 IBLA 119, 122 (1986): "[A]n 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." In this case, it appears appellants hold actual title to lot 3.

[2] As to lot 11, we also conclude that BLM's rejection was correct. A color-of-title claim must be based on a source other than the United States. Thus, contrary to appellants' argument, the patent to the State of Minnesota for lot 3 cannot serve as a basis for initiation of appellants' color of title for lot 11. See Jerome L. Kolstad, *supra*. There is no evidence to support appellants' contention that the land comprising lot 11 was conveyed with the land in lot 3. This Board has consistently held that the instrument of conveyance must, on its face, purport to convey title to the omitted lands subject to the color-of-title application. Mable M. Farlow, 30 IBLA 320 (1977); Jerome L. Kolstad, *supra*. In the case at hand, the instruments of conveyance do not give any indication that the omitted lands were conveyed with lot 3. Appellant's deed of July 18, 1961, and the other instruments of conveyance in the record simply name lot 3 without giving metes and bounds descriptions or acreage figures. There is no information in the record as to the acreage in lot 3 except for the original 1880 plat showing such acreage to be 29.75 acres. Thus, the documents of record do not allow the conclusion that any lands in addition to the 29.75 acres in lot 3 were intended to be conveyed.

An applicant under the Act has the burden of proof to establish that the statutory conditions for purchase under the Act have been met. Hal H. Memmott, 77 IBLA 399 (1983). In this case, appellants have failed to show a chain of title to lot 11 dating back to January 1, 1901, or the payment of taxes back to January 1, 1901. <sup>1/</sup> Further, they have failed to provide a deed or other document which purports to convey the lands in lot 11, and have not shown by any other evidence that it was intended that such lot be conveyed as part of lot 3.

One further matter must be mentioned. At page 2, paragraph 3 of BLM's decision, BLM correctly states that extrinsic evidence may be used to show that a deed contains a latent ambiguity. BLM then states: "Therefore, although when read together with the deed, the plats, records and other documents in actuality conveys not only Lot 3 but the additional acreage defined by the Official Plat of Survey as Lot 11, the intention to convey is apparent." This sentence appears to incorrectly suggest that when read together with other documents, appellants' deed intends to convey more than lot 3. BLM correctly states in the next sentence that no ambiguity has been shown. Accordingly, BLM's decision is modified to the extent the above-quoted sentence is inconsistent with the Board's decision.

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<sup>1/</sup> The record indicates the first conveyance of lot 3 appellants show in their chain of title is an April 30, 1902, conveyance from the State of Minnesota to the Duluth and Iron Range Railroad Company. The first entry for payment of taxes on lot 3 shown by appellants is for the year 1911.

To the extent appellants have raised arguments which we have not specifically addressed herein, they have been considered and rejected.

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 as modified. 2/

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John H. Kelly  
Administrative Judge

We concur:

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Franklin D. Arness  
Administrative Judge

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Wm. Philip Horton  
Chief Administrative Judge

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2/ Though appellants' claim to lot 11 is not cognizable under the Act, it could be advanced under section 211(b)(2) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1721(b)(2) (1982), which provides:

"The Secretary is authorized to convey to the occupant of any omitted lands which, after survey, are found to have been occupied and developed for a five-year period prior to January 1, 1975, if the Secretary determines that such conveyance is in the public interest and will serve objectives which outweigh all public objectives and values which would be served by retaining such lands in Federal ownership. Conveyance under this subparagraph shall be made at not less than the fair market value of the land, as determined by the Secretary, and upon payment in addition of administrative costs, including the cost of making the survey, the cost of appraisal, and the cost of making the conveyance." Procedures for filing an application under the above section are set forth at 43 CFR 2547. We express no opinion as to whether conveyance of lot 11 would be warranted under section 211(b)(2) of FLPMA.