

JAMES R. BIERSACK

IBLA 88-260

Decided January 29, 1991

Appeal from separate decisions of the Eastern States Office, Bureau of Land Management, rejecting applications filed under the O'Konski Act (ES 35936), and the Color of Title Act (ES 36696).

Vacated in part, reversed in part and remanded.

1. Conveyances: Interest Conveyed--Patents of Public Lands: Generally--Public Lands: Generally--Public Lands: Disposals of: Generally--Public Sales: Generally--Surveys of Public Lands: Generally--Surveys of Public Lands: Omitted Lands

If an official plat depicts the boundary of a parcel as a water line, the meander line is not a line of boundary, and a patent for a tract of land bordering on a river or lake conveys the land to the water line. An exception to this rule of law is applied when either fraud or gross error is discovered in an existing survey. If either is found, the omitted lands are assigned new lot numbers, the previously issued patent is deemed to have conveyed only those lands on the shore side of the meander line, and title to lands lying between the meander line and the actual water line is deemed to be the omitted land and the property of the United States.

2. Public Sales: Sales Under Special Statutes

The O'Konski Act is a remedial Act intended to correct a recognized error resulting from fraudulent or grossly erroneous cadastral surveys and allow those Wisconsin property owners who have, since Jan. 21, 1953, been in good faith and in peaceful and open possession of lands lying between the originally determined meander line and the actual meander line an opportunity to acquire omitted lands in the same manner as the lands would have been acquired if the original survey had been accurate. Being remedial, the O'Konski Act should be liberally construed in favor of those entitled to its benefits.

3. Public Sales: Sales Under Special Statutes

To qualify under the O'Konski Act, the applicant must show that the land lying between the originally determined meander line and the actual meander line was held in good faith and in peaceful, adverse possession prior to Jan. 21, 1953. A break in the chain of title prior to Jan. 21, 1953, will not be a basis for rejection of an O'Konski application, so long as there has been no break in the chain of title since that date.

4. Color or Claim of Title: Generally--Color or Claim of Title: Applications--Color or Claim of Title: Description of Land--Surveys of Public Lands: Omitted Lands

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 purporting on its face to convey the claimed land to the applicant or the applicant's predecessors. If the land sought is omitted land lying adjacent to a lake, and the document relied upon described the land in accordance with a Government survey showing the land as lakeshore property, such a document purports on its face to convey the claimed land.

5. Color or Claim of Title: Good Faith

A class 1 applicant under the Color of Title Act, 43 U.S.C. § 1068 (1988), must show that the land has been held in good faith and in peaceful, adverse possession by the applicant or his predecessors in interest for more than 20 years. If the predecessor's possession is not in good faith, the chain has been broken, and the predecessor's holding period may not be tacked on to that of the applicant. Good faith requires an honest belief by the claimant or the predecessors that they were invested with title. When a predecessor files an application for land between a meander line and a lakeshore and the application is rejected for the stated reason that the land being sought is owned by the upland owner and thus is not in Federal ownership, the lack of good faith ordinarily attributable to the filing of that application may be vitiated.

APPEARANCES: James R. Biersack, Westboro, Wisconsin, pro se; Robert D. Comer, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for the Bureau of Land Management.

117 IBLA 340 OPINION BY ADMINISTRATIVE JUDGE MULLEN

James R. Biersack (Biersack) has appealed from two decisions of the Eastern States Office, Bureau of Land Management (BLM), dated January 19, 1988, rejecting his applications to purchase lots 11 and 12 of sec. 35, T. 33 N., R. 1 E., fourth principal meridian, Wisconsin, containing 77.76 acres. The lots are riparian to Shearer Lake, and appellant's house and other improvements lie near the lakeshore.

In the first of the two decisions BLM rejected application ES 35936, filed by Biersack pursuant to the Act of August 24, 1954, 43 U.S.C. § 1221 (1988), commonly known as the O'Konski Act. The second BLM decision rejected application ES 36696, which he filed under the Color of Title Act, 43 U.S.C. § 1068 (1988).

Sec. 35, T. 33 N., R. 1 E., fourth principal meridian, Wisconsin, was initially lotted when a plat of survey was approved July 21, 1862. The survey established lotted legal subdivisions in that section for lands bordering on Shearer lake. Lots 1, 2, 3, and 6 were first patented in 1870, were conveyed on a number of occasions, and sold at a Sheriff's sale on at least two occasions.

In 1929, S. D. and Rebecca Austin conveyed the land to Harry D. and Martha Jaquith. Following Harry D. and Martha Jaquith's death the property passed to their heirs. One of the heirs, Cornelius Jaquith, became concerned after noting that the meander line depicted on the plat of survey appeared to differ greatly from the actual shoreline of Shearer Lake. In February 1969, he was advised by counsel that, considering the apparent discrepancy, the land lying between the meander line and the shoreline might be characterized as omitted public land. Acting upon this advice, Jaquith filed an application under the Color of Title Act, 43 U.S.C. § 1068 (1988), in hopes of obtaining clear title to the lands between the meander line and the lake shore.

In a decision dated November 17, 1969, BLM rejected Jaquith's color-of-title application. BLM based its rejection upon a report from the Chief, Division of Cadastral Survey "that there is no omitted land within the meaning of the term, so as to justify a survey by Bureau of Land Management, and that therefore no public land exist in this section" (ES 5992). Jaquith's heirs sold the land to Biersack in 1969, and Biersack held title from that date to the date of appeal.

The record contains an unsigned copy of an April 2, 1982, letter from Biersack informing BLM of his intent to petition for a survey to ascertain if there was any omitted land. His petition was apparently accepted, as the land was surveyed. During the course of the survey, the Cadastral Survey either found gross error in the initial survey or found the survey to have been fraudulent, as the lands between the meander line in the original survey and the actual shoreline were deemed to be omitted lands and assigned lot numbers 11 and 12. The plat of survey designating the omitted lands as lots 11 and 12 was accepted on April 26, 1985, and officially filed on June 17, 1985.

In July 1985, Biersack sought information about how he might acquire the land in lots 11 and 12 previously believed to be a part of lot 6. BLM responded on December 5, 1985, advising him of three options which might be available: (1) the Color of Title Act, 43 U.S.C. § 1068 (1988); (2) the O'Konski Act of August 24, 1954, 43 U.S.C. § 1221 (1988); and (3) by public sale under section 203 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1713 (1988). On January 21, 1986, Biersack filed O'Konski Act application ES 35936, and Color of Title Act application ES 36696. The January 19, 1988, rejection of these applications is now under review.

[1] When a patent defines land with reference to an official plat, the plat becomes part of the instrument of conveyance. United States v. Pappas, 814 F.2d 1342, 1343 (9th Cir. 1987); Snake River Ranch v. United States, 542 F.2d 555, 556 (10th Cir. 1976). If an official plat depicts the boundary of a parcel as a water line, the "meander line is not a line of boundary and * * * a patent for a tract of land bordering on a river [or lake] conveys the land not simply the meander line, but to the water line." Horne v. Smith, 159 U.S. 40, 42 (1895); see Producers Oil Co. v. Hanzen, 238 U.S. 325 (1915); Railroad Co. v. Schurmeir, 74 U.S. (7 Wall.) 272, 286-87 (1869); United States v. Pappas, *supra*; United States v. Ruby Co., 588 F.2d 697, 700 (9th Cir. 1978), *cert. denied*, 442 U.S. 917 (1979). Surveyors establish meander lines only to calculate acreage, not to establish boundaries. United States v. Pappas, *supra*; United States v. Ruby Co., *supra*. Natural boundaries described in conveyances take precedence over computation of acreage. United States v. State Investment Co., 264 U.S. 206, 211 (1924); United States v. Pappas, *supra* at 1344; Snake River Ranch, v. United States, *supra* at 557.

An exception to the above-stated rules of law is applied when either fraud or gross error is discovered in an existing survey. If either is found, the omitted lands are assigned new lot numbers, the previously issued patent is deemed to have conveyed only those lands on the shore side of the meander line, and title to lands lying between the meander line and the actual water line is deemed to be omitted land and the property of the United States. Jeems Bayou Fishing & Hunting Club v. United States, 260 U.S. 561, 564 (1923); Lee Wilson & Co. v. United States, 245 U.S. 24, 29 (1917); United States v. Ruby Co., *supra*.

It is clear that upon resurvey the Cadastral Survey found either a gross error or fraud in the initial survey, as the land now described as lots 11 and 12 was identified and designated as omitted lands during the course of the resurvey. If this were not the case, no additional lots would have been established and designated.

BLM rejected both the O'Konski Act application and the color-of-title application.

The O'Konski Act, an Act peculiar to the State of Wisconsin, was prompted by inequities and chaotic conditions resulting from landowner

reliance on fraudulent or grossly erroneous cadastral surveys of Wisconsin lands made in the mid-1800's. In many cases, after the Cadastral Survey conducted a resurvey of lands adjacent to lakes and rivers, the upland landowners found that land considered to be in private ownership for over 100 years was Federal land. The O'Konski Act affords an equitable resolution of this problem for those who held the land between the originally determined meander line and the actual meander line in good faith and in peaceful, adverse possession prior to January 21, 1953. These owners could apply for a patent to the land and receive the land upon payment of the price that would have been paid if the original Cadastral Survey had been correct and the lands had been included in the original patent. ^{1/}

In the report accompanying the O'Konski Act legislation, when it was before the 83rd Congress (identified as H.R. 8006), the House Committee on Interior and Insular Affairs (Committee) noted the historic background leading to the legislation:

Prior to 1910, Federal law required that public lands of the United States be made under contracts to private surveyors. More than 100 years ago * * * private surveyors * * * made such surveys in the State of Wisconsin, including the northern area where there are located more than 2,000 lakes.

It since has become quite apparent that in many instances these private surveyors failed to accurately locate the boundaries of rivers and lakes through what is known as meandering * * *, but instead only estimated the size, location of shorelines etc. Resurveys made by the Bureau of Land Management have disclosed numerous errors in the earlier surveys.

Present occupants of these lands adjacent to rivers and lakes, and their predecessors in title, who obtained patents or deeds to tracts of land under applicable public land laws or through purchase, believing they owned to the shoreline of a river or lake, subsequently have discovered they actually own only the lands embraced in the original -- and inaccurate -- survey.

H.R. Rep. No. 2242, 83rd Cong., 2d Sess., at 2 (1954).

In response to a request made by the Committee Chairman, the Secretary filed a letter expressing his views and making suggestions regarding the language of the bill. His letter was made a part of H.R. Rep. No. 2242. The Secretary stated, in pertinent part:

The need for this bill is derived from the fact that a more accurate survey has been made in the lake area of Wisconsin which indicates that in many cases the meander lines of lakes were not

^{1/} The applicant must pay a minimum of \$1.25 per acre if the original purchase price was less than that amount.

correctly determined. Consequently it has been discovered that many persons who, relying upon the original survey, believed that they owned to the shoreline of a lake, actually own only the lands embraced in the original survey. The purpose of this bill is to assist them in obtaining title to the land of which they hitherto believed themselves owners.

Existing legislation cannot be utilized in all cases to cure the situation arising from this unfortunate error. * * * Under the [Color of Title Act] claims are limited to 160 acres. An applicant may qualify under the act if he and his ancestors or grantors have held the lands in adverse possession for at least 20 years, and have placed valuable improvements upon the land, or have reduced some part of the land to cultivation. In the alternative, he may show such adverse possession and the payment of local taxes for the lands commencing not later than January 1, 1901, to the date of application.

H.R. Rep. No. 2242, 83rd Cong., 2d Sess., at 3 (1954).

The Secretary noted that similar legislation had been enacted in 1925 (Act of February 27, 1925), and stated that the Department favored passage of new legislation because the Act of February 27, 1925, was limited to those who had acquired title prior to 1925. He stated his belief that the new legislation would "protect present owners of the adjacent tracts." Id.

Notwithstanding his desire to see corrective legislation passed, the Secretary proposed alternative language (in the form of a substitute bill) to

authorize a person, who believed that he obtained land to the shoreline of an inland lake in Wisconsin and failed to do so only because of the erroneous early survey, to apply to the Secretary * * * to purchase lands lying between the meander line as originally determined and the meander line as actually determined of which he has been in open possession since January 21, 1953.

Id.

The language as proposed by the Secretary and adopted by the Committee is identical to that set out below in all applicable respects. The Committee report explained, in applicable part, that the substitute language would:

(1) authorize any person believing he had obtained land to the shoreline of an inland river or lake in Wisconsin but failing to do so only by reason of an early erroneous survey, to apply to the Secretary of the Interior for purchase of lands lying between the originally determined meander line and the actual meander

line of which such applicant has been in open possession since January 21, 1953.

Id. at 2.

As enacted, the O'Konski Act, 43 U.S.C. § 1221 (1988), provides:

Whenever it shall be shown to the satisfaction of the Secretary of the Interior that a tract of public land, lying between the meander line of an inland lake or river in Wisconsin as originally surveyed and the meander line of that lake or river as subsequently resurveyed, has been held in good faith and in peaceful, adverse possession by a person, or his predecessors in interest, who had been issued a patent, prior to January 21, 1953, for lands lying along the meander line as originally determined, the Secretary of the Interior shall cause a patent to be issued to such person for such land upon the payment of the same price per acre as that at which the land included in the original patent was purchased and upon the same terms and conditions. All persons seeking to purchase lands under this subchapter shall make application to the Secretary within one year from August 24, 1954, or from the date of the official filing of the plat or resurvey, whichever is later, and the Secretary of the Interior shall cause no patents to be issued for land lying between the original meander line and the resurveyed meander line until the conclusion of such periods.

43 U.S.C. § 1221 (1988).

[2] Considering the congressional statement of the intent of the O'Konski Act and the Secretary's stated reasons for the Act, it becomes quite apparent that the O'Konski Act is a remedial Act intended to correct a recognized error resulting from fraudulent or grossly erroneous cadastral surveys in Wisconsin. The faulty land surveys leading to inequities triggering this Act had been conducted by private surveyors under contract with the United States. These surveys were assumed to be true and accurate by the Government and the private sector for many decades. 2/ The O'Konski Act permits those property owners who have been in good faith and in peaceful and open possession of lands lying between the originally determined meander

2/ In fact, if the Cadastral Survey finds the original survey to be correct on resurvey, or deems any error found to be something less than gross error, the lot owner would have title to the lands between the meander line and the shoreline, and would have no need to seek title from the United States. Unless and until the Cadastral Survey makes an adverse determination, the landowner is considered to be the owner of the lands between the meander line and the shoreline. Thus on Nov. 17, 1969, BLM properly rejected Jaquith's Color of Title Act application when the Cadastral Survey found "that there is no omitted land within the meaning of the term, so as to justify a survey by the Bureau of Land Management, and that therefore no public land exist in this section."

line and the actual meander line since January 21, 1953, an opportunity to acquire omitted lands in the same manner as the lands would have been acquired if the original survey had been accurate. This opportunity is extended to Wisconsin property owners only when, after more than 100 years, the Cadastral Survey discovers fraud or a gross error in the original survey depicting a river or lake, and there is a gross difference between the shoreline of the river or lake and its location as depicted in the original survey. Being remedial legislation, it should be liberally construed in favor of those entitled to the benefits of the statute. See, e.g., Secony Vacuum Oil Co. v. Smith, 305 U.S. 424 (1938); McFaddin v. Evans-Snyder-Buel Co., 185 U.S. 505 (1905).

In its January 19, 1988, decision BLM rejected Biersack's application based upon a finding that Biersack failed to qualify under the O'Konski Act because lots 1, 2, 3, and 6 had been sold for taxes in 1927, 1928, and 1932, making Biersack neither the patentee nor the successor in interest of the patentee. ^{3/} Two fundamental errors are found in BLM's decision. The first was made when the application was identified as a "Color-of Title Application (The O'Konski Act)." The second was made when the O'Konski Act requirements were compared to those for a class 1 Color of Title Act application.

There are important and fundamental differences between the O'Konski Act and the Color of Title Act. First, the Color of Title Act is not corrective legislation liberally construed in favor of those entitled to the benefits of the statute. ^{4/} Under the O'Konski Act, a person may apply for a patent to a "tract of public land, lying between the meander line of an inland lake or river in Wisconsin as originally surveyed and the meander line of that lake or river as subsequently resurveyed," if that land was held "in good faith and in peaceful, adverse possession by a person, or his predecessor in interest, who had been issued a patent, prior to January 21, 1953." The conclusion reached by BLM is based upon a very narrow interpretation of the phrase "by a person, or his predecessor in interest, who had been issued a patent, prior to January 21, 1953," requiring no break in the chain of title since the date of patent -- in this case since 1870.

Admittedly, BLM's very narrow interpretation is conceivable. However, it does not comport with the intent stated by the Committee and the Secretary, and misses the emphasis they both placed on the phrase "prior to January 21, 1953." Both stated the test as being whether the "applicant has been in open possession since January 21, 1953." In fact, the Secretary recognized the very problem we are now addressing when he noted that

^{3/} We are unable to tell from the record whether the sales were for back taxes or resulted from a mortgage foreclosure. A mortgage foreclosure sale would not break the chain of title.

^{4/} This distinction has been recognized by the Department since 1925. The Color of Title Act decisions have been indexed under a category of the same name. Decisions pertaining to the O'Konski Act and its 1925 predecessor are found under the index title "Public Sales: Sales Under Special Statutes."

the ability to acquire land under the Act of February 27, 1925, "is limited to those who acquired title prior to the date of that Act."

[3] Under the more liberal interpretation, the applicant must show a good chain of title from and after January 21, 1953. If that date is recognized as having meaning, it will also support a comparison between a class 2 application under the Color of Title Act and an application under the O'Konski Act. To the extent there is a parallel between the two Acts, that parallel lies between what is commonly referred to as a class 2 color-of-title claim and not a class 1 claim. A comparison of the O'Konski Act claim to a class 2 color of title claim results in an entirely different conclusion than that reached by BLM.

If a break in the chain of title occurred prior to January 1, 1901, and there is no break in the chain of title between that date and the date of application, the break in the chain of title occurring prior to January 1, 1901, does not serve as a basis for denying a class 2 Color of Title Act application. John Stewart Hunt, 31 IBLA 304 (1977). As noted by the Secretary when commenting on the proposed legislation leading to the O'Konski Act, a class 2 applicant may show "adverse possession and the payment of local taxes for the lands commencing not later than January 1, 1901, to the date of application." H.R. Rep. No. 2242, supra at 3. Similarly, for an O'Konski Act application there must be a showing that the land was held in good faith and in peaceful, adverse possession by a person (or his predecessor-in-interest, who had been issued a patent) prior to January 21, 1953. As with a class 2 color-of-title application, it matters not that there may be a break in the chain of title between the date of patent and January 21, 1953, so long as there has been no break in the chain of title since that date. BLM's incorrect interpretation of the O'Konski Act as requiring an unbroken chain of title from the date of patent to the date of the application caused it to improperly reject Biersack's application. Accordingly, we will vacate BLM's decision and remand the case for further consideration.

[4] We turn now to BLM's decision rejecting appellant's class 1 color-of-title application. The Act provides, in pertinent 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 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.

43 U.S.C. § 1068 (1988).

BLM determined that the deeds conveying lots 1, 2, 3, and 6, sec. 35, provide no color of title to the omitted land. In its response to appellant's statement of reasons (SOR), BLM states that, because the meander

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line and not the water line is the limit of the grant, the omitted lands remained the property of the Government. Id. at 6. The issue, however, is not whether the land at issue is the property of the Government. That fact is undisputed.

BLM has cited a number of cases in support of its argument, but has overlooked the Board decision most directly on point for this issue, James E. Gaylord, Jr., 94 IBLA 392 (1986). In Gaylord, the deed creating the color of title was executed at a time when the official United States survey showed the lots named in the deed as lakeshore property. In the instant appeal, as in Gaylord, appellant submitted a letter from a county official referring to the old plat map showing the lakeshore. In Gaylord, the Board examined the document and concluded that, if land sought is omitted land lying adjacent to a lake and the document relied upon describes the land in accordance with a Government survey showing the land as lakeshore property, the document purports on its face to convey the claimed land. Our holding in Gaylord controls the disposition of this appeal and compels us to reverse BLM's decision.

[5] In its response to Biersack's SOR, BLM states a basis for rejecting his class 1 color-of-title application not mentioned in its decision: Biersack does not meet the 20-year good faith, adverse possession requirement.

A class 1 Color of Title Act applicant must demonstrate that the land was held in good faith and in peaceful, adverse possession by the applicant or his predecessors-in-interest for more than 20 years. 43 U.S.C. § 1068 (1988). In addition, if the applicant's predecessors' possession is not in good faith, the chain has been broken, and the predecessor's holding period may not be tacked on to that of the applicant.

Good faith requires an honest belief that the holder is invested with title. It is well established that if the one in possession knows that title is in the United States the good faith requirement cannot be satisfied. 43 CFR 2540.0-5(b); see Day v. Hickel, 481 F.2d 473, 477 (9th Cir. 1977). BLM argues that Jaquith knew that the land at issue was public land when he filed a color-of-title application in 1969.

There are many Board decisions affirming rejection when knowledge held by the applicant or his predecessor-in-interest has precluded a finding of good faith. Louis Mark Mannatt, 109 IBLA 100 (1989) (appellant sought lease for the land); Felix F. Vigil, 84 IBLA 142 (1984) (applicant held grazing lease); Earl Hummel, 44 IBLA 110 (1979) (applicant had previously filed a homestead application); Nora Beatrice Kelley Howerton, 71 I.D. 429 (1964) (applicant's predecessor had filed a color-of-title application). However, Jaquith's application was not rejected because of Jaquith's failure to qualify. It was rejected because the Cadastral Survey determined that the land sought by Jaquith was not omitted Federal lands, and therefore was not subject to the Color of Title Act. BLM's decision vitiated any claim that Jaquith lacked good faith attributable to Jaquith's filing a color-of-title application after receiving advice from his attorney that the Federal

Government might consider the lands to be omitted lands. ^{5/} This appeal may be distinguished from Howerton. In Howerton the prior color-of-title application appears to have been rejected for reasons other than the Government's lack of title to the land at issue.

We express no opinion as to whether other grounds may exist for finding a lack of good faith for the requisite 20-year period. See generally Lawrence E. Willmorth, 64 IBLA 159 (1988), aff'd, Willmorth v. Watt, No. C-82-518-JLQ (E.D. Wash. July 27, 1987). BLM's rejection was based solely on its finding that Biersack's deed did not purport to convey the land at issue, and BLM has not attempted to adjudicate other issues relating to appellant's qualifications under the Color of Title Act. It is therefore appropriate for BLM to do so on remand.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision rejecting appellant's O'Konski Act application is vacated and remanded for further action consistent with this opinion and the decision rejecting his color-of-title application is reversed and remanded for further action consistent with this opinion.

R. W. Mullen
Administrative Judge

I concur:

Gail M. Frazier
Administrative Judge

^{5/} As noted previously, for all practical purposes, the lands between the meander line and the shoreline were not omitted lands until the Cadastral Survey made its declaration that they were.