

THOMAS E. PLUSKA & MICHAEL J. MCCORMACK

IBLA 99-17

Decided October 31, 2000

Appeal from a decision of the Eastern States Office, Bureau of Land Management, rejecting class 2 color-of-title application MOES 46890.

Affirmed in part, reversed in part, and remanded.

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 January 1, 1901, to the date of the application.

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

Faced with both class 1 and class 2 color-of-title applications from an applicant, where the tax records cannot sustain the class 2 application, BLM should permit applicants to submit evidence to substantiate their class 1 claim, when that claim is the more recent.

APPEARANCES: J. Russell Ford, Esq., Kansas City, Missouri, for appellants.

OPINION BY ADMINISTRATIVE JUDGE TERRY

Thomas E. Pluska and Michael J. McCormack (applicants) have appealed an August 5, 1998, decision of the Eastern States Office, Bureau of Land Management (BLM), rejecting their application (MOES 46890) filed under the Color-of-Title Act, as amended, 43 U.S.C. §§ 1068-1068b (1994), for approximately 40 acres of land described as the NE<sup>1</sup>/<sub>4</sub>NW<sup>1</sup>/<sub>4</sub> sec. 35, T. 39 N., R. 18 W., Fifth Principal Meridian, Camden County, Missouri.

The Color-of-Title Act, 43 U.S.C. § 1068 (1994), 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, 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 \* \* \*.

The method for obtaining a patent outlined in subsection (a) of 43 U.S.C. § 1068 (1988) is referred to as a class 1 claim; the method described in subsection (b) is known as a class 2 claim. 43 C.F.R. § 2540.0-5(b).

The case file contains several color-of-title applications submitted on behalf of applicants. The first application, signed on July 15, 1994, by a representative of the title company researching the title to the property for the applicants, designated the claim as a class 1 claim, but did not identify any structural or cultural improvements or cultivation on the land. By letter dated August 9, 1994, BLM returned the July 15 application without any action, advising applicants that the application was incomplete because the named applicants had not signed it and not all of the questions had been answered. Applicants responded by signing and submitting a September 4, 1994, application which reclassified the claim as a class 2, not a class 1, claim. However, in a letter dated March 17, 1997, BLM, apparently overlooking the September 4, 1994, application, again asked the applicants to correct the deficiencies in the July 15, 1994, class 1 application. In response, applicants filed another application, with a signature date of March 31, 1996, which labeled the application a class 1 application and for the first time identified \$3,000 worth of timberland as an improvement on the property and indicated that the land was "self-cultivated."

BLM's decision, although it purports to address the July 1994 application, treats the application as a class 2 application as do applicants' appeal submissions. In their class 2 color-of-title application, signed on September 4, 1994, and attached supplemental information, applicants traced their chain of title back to a January 24, 1898, conveyance to George Moulder who unsuccessfully sought a homestead patent for the land. George Moulder apparently initially received a patent for the land, but the patent was subsequently cancelled for illegality on October 3, 1905, since he had already received a homestead patent. Applicants also provided tax payment data showing payment of levied taxes by Moulder and his heirs from 1904 through 1925, and by others from 1971 through 1983, and from 1985 through 1994. Applicants explained that the county court house had burned in 1902, destroying earlier tax payment records and that the tax records

for 1926-1970 and for 1984 had apparently been lost. Despite the missing records, applicants asserted that the extant evidence sufficed to support the inference that all assessed taxes had been properly paid.

In its August 5, 1998, decision, BLM rejected the 1994 class 2 application, finding the incomplete tax levy and payment record fatal to the application. BLM further noted that the peaceful adverse possession since 1901 necessary to satisfy the class 2 requirements did not include any time when a political subdivision held ostensible title to the land because of nonpayment of taxes. BLM did not address the class 1 applications.

On appeal, applicants argue that they have provided sufficient information not only to establish their chain of title to the land beginning in 1898, but also to demonstrate that their chain has not been broken for nonpayment of taxes. Citing the statement in a May 11, 1994, letter from the Camden County collector that real estate parcels are offered for sale at public auction when delinquent taxes have accrued for 3 years, they contend that all real estate taxes must have been paid since their chain of title does not show any conveyance due to nonpayment of taxes. Accordingly, applicants maintain that they have satisfied the requirements for a class 2 color-of-title claim.

[1] BLM correctly determined that applicants had no valid class 2 claim because they had failed to show payment of taxes from 1901 through 1904, from 1926 through and 1970, and in 1984. A class 2 color-of-title applicant must provide positive evidence that taxes were actually paid; reliance on a presumption of payment is not enough. See Estate of John C. Brinton, 25 IBLA 283, 286 (1976), vacated in part on other grounds, Estate of John C. Brinton, 71 IBLA 160 (1983); see also Soterra, Inc., 95 IBLA 352, 355 (1987). The payment requirement is imposed by statute and may not be waived. Mattie J. Patterson, 149 IBLA 367, 371 (1999); see Agee S. Broughton, Jr., Trustee, 95 IBLA 343, 344 (1987); Soterra, Inc., supra; Weyerhaeuser Co., 89 IBLA 279, 280 (1989). While it is unfortunate that the tax records needed to prove the requisite payments have been lost and are thus not available to applicants, we cannot accept applicants' assumption that the lack of a tax sale in their chain of title establishes that the levied taxes were paid. The lack of a tax sale fails to positively demonstrate that the taxes were actually paid. We find that applicants have failed to produce evidence sufficient to satisfy the tax payment requirement for a class 2 color-of-title claim.

However, we must reverse BLM to the extent the decisionmaker relied on the conclusion that a class 2 claim "cannot include any time when the ostensible title was held by a political subdivision because of non payment of taxes." (Decision at 2.) While this is an accurate statement of law, it bears no relevance to a decision in this matter, as there is no period in which the record demonstrates that title was held by a political subdivision. Moreover, the record shows that the latest application was filed as a class 1 claim. The decision does not purport to address this application.

We note that, to prove this claim, the applicants would have to show that the claim "has been held in good faith and in peaceful adverse possession \* \* \* under claim or color-of-title for more than 20 years," 43 C.F.R. § 2540.0-5(b), prior to the time the applicants became aware that title was in the United States. In addition, applicants would be compelled to show improvements to land by their predecessors-in-interest. In Mattie J. Patterson, 149 IBLA at 372, we cited Benton C. Cavin, 83 IBLA 107, 121 (1984), in observing "that past actions of a color-of-title applicant relating to silviculture [timbering] practices may well establish that an applicant has placed improvements on the land as required for a class 1 claimant." We also noted in Cavin that "the Department's decision in Ben S. Miller, [55 I.D. 73, 76 (1934)] dealt with 'clearing of under brush, dead trees, the trimming and thinning of trees' in the context of improvements of the land, not cultivation." Benton C. Cavin, *supra* at 121.

In Patterson, *supra* at 372, we further noted that in Soterra, Inc., *supra*, BLM had issued a decision rejecting a class 2 color-of-title application, and had determined that the applicant failed to meet class 1 requirements because valuable improvements were not placed on the land and the land was not used for cultivation. The record in that case (Soterra) indicated that, while the land had not been cultivated, the appellant or its predecessors-in-interest had engaged in the management of timber on the land. Accordingly, citing Cavin, we vacated and remanded the Soterra decision to BLM to allow appellant to file a class 1 color-of-title application detailing its or its predecessor's forestry practices in support of a claim that valuable improvements had been placed on the subject tract. Soterra, Inc., *supra* at 356.

[2] Based on this precedent, BLM should permit applicants to file material to substantiate their class 1 application which BLM never formally addressed. Estate of John C. Brinton, 71 IBLA at 163. Applicants should be allowed to submit additional evidence detailing forest and farming practices on the land to establish that valuable improvements were placed thereon, as well as to make the requisite showing of peaceful adverse possession for 20 years.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decision appealed from is affirmed in part, reversed in part, and remanded to BLM for actions consistent with this decision.

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James P. Terry  
Administrative Judge

I concur:

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Lisa K. Hemmer  
Administrative Judge

