



SALLY SIEGEL

177 IBLA 68

Decided April 8, 2009



United States Department of the Interior
Office of Hearings and Appeals
Interior Board of Land Appeals
801 N. Quincy St., Suite 300
Arlington, VA 22203

SALLY SIEGEL
DAVID MATTNER

IBLA 2008-175

Decided April 8, 2009

Appeal from decision of the Uncompahgre (Colorado) Field Office, Bureau of Land Management, determining that a house on public land was in trespass (COC 68307), returning an application filed under the Mining Claims Occupancy Act (C-2678), rejecting an application under the Color of Title Act (COC 72178), and offering a land use permit (COC 71167).

Affirmed.

1. Mining Occupancy Act: Qualified Applicant

Because Congress expressly provided that rights and privileges to qualify as an applicant under the Mining Claims Occupancy Act, 30 U.S.C. §§ 701-711 (2000), shall not be assignable, but may pass through devise or descent, BLM is under no obligation to consider an application under that Act after the claim has been sold.

2. Color or Claim of Title: Good Faith

The Color of Title Act, 43 U.S.C. § 1068 (2000), provides for issuance of a patent for up to 160 acres upon a showing “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.” The burden of proof is on the applicant to prove each element of his claim, and failure to satisfy this burden as to any element is fatal to his application. An applicant’s uncertainty as to whether or not his improvements are on Federal land cannot serve as the basis for good faith in a claim of color of title.

APPEARANCES: Michael Lynch, Esq., Telluride, Colorado, for appellants; Lance Wenger, Esq., Office of the Solicitor, U.S. Department of the Interior, Lakewood, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE M^SDANIEL

Sally Siegel and David Mattner have appealed from a May 1, 2008, decision of the Uncompahgre Field Office, Bureau of Land Management (BLM), that determined that their house on public land is in trespass (COC 68307). BLM also returned an application filed under the Mining Claims Occupancy Act (MCOA) (C-2678), 30 U.S.C. §§ 701-711 (2000), and rejected an application under the Color of Title Act, 43 U.S.C. § 1068 (2000) (COC 72178). BLM offered appellants a land use permit and determined a cost category for processing the permit (COC 71167). Appellants challenge the finding of trespass, the return of their MCOA application, and the rejection of their color of title application. For reasons explained below, we affirm BLM's decision finding trespass and returning the MCOA application, and we affirm BLM's decision rejecting the application under the Color of Title Act.

BACKGROUND

This appeal involves appellants' occupancy of a tract of land located about 10 miles west of Telluride, Colorado, and within an area now described as the SW¹/₄SE¹/₄, sec. 13, T. 43 N., R. 11 W., New Mexico Principal Meridian (N.M.P.M.), Colorado, that includes a house, workshop, and other property. See appellants' Statement of Reasons (SOR) at 2; Notice of Trespass dated February 25, 2005. The issues in this case arise from prior uncertainty as to whether the occupancy and improvements were located on public land or patented land.

Much of the history of occupancy by appellants' predecessors is set forth in a 1964 Mineral Report (MR) prepared by BLM as a preliminary examination of the Sam's Placer mining claim and of a possible trespass. BLM's uncertainty about the boundaries of parcels of public land in section 13 precluded BLM from taking any action without first performing a survey.¹ In 1903 and 1906, homestead patents had been issued for the W¹/₂NE¹/₄ of section 13, and in 1940 the owner of that land, Charles E. Seevers, allowed one "Slim" Foster to occupy a site where appellants now have their improvements based on the owner's belief that the land was his. MR at 2, 4.

On July 16, 1954, Robinson located the Sam's Placer mining claim, which he described in the Location Certificate as N¹/₂NE¹/₄SW¹/₄, sec. 13, T. 43 N., R. 11 W.,

¹ The plat of survey for sec. 13, T. 43 N., R. 11 W., N.M.P.M. was officially approved in 1882. See MR at 2.

N.M.P.M. Foster still occupied the site authorized by Seevers when Robinson located his claim. Amended locations were filed in 1958 and 1961.² MR at 3. Robinson believed that a portion of Foster's occupancy was not on the patented homesteads, but on the south half of his claim. MR at 4. Deeming Foster's improvements unsightly, Robinson purchased them and removed them in 1955. *Id.* Robinson established what BLM considered a principal place of residence in 1954 on what he believed to be the north half of the Sam's Placer claim. MR at 4, 5. In December 1954, Robinson assigned an undivided half interest in the claim to W. M. and Zaida L. Clegg, but the Cleggs conveyed their interest back to Robinson in 1958 in order to clear the record to facilitate Robinson's efforts to obtain a patent for the claim. MR at 4. It was later understood that the south half of the claim (that had contained Foster's improvements) would be conveyed to the Cleggs when a patent was issued. MR at 5.

By decision dated October 10, 1960, BLM rejected Robinson's patent application for failure to include the application fee and other reasons. MR at 1, 6. On the basis of assurances from Robinson and his attorney that a patent would eventually be obtained, Clegg started construction of his improvements on the south half of the claim in May 1962 and established his principal place of residence there that year. MR at 1, 5, 15-16. Robinson continued to file affidavits of assessment work for the claim. MR at 5.

Clegg's inquiries about the status of the land prompted BLM to examine the claim. *See* MR at 1. The Mineral Report notes that the July 15, 1954, location was null and void *ab initio* because a subsisting oil and gas lease precluded location at that time, so that possessory rights to the claim arise at the earliest from the 1958 location.³ MR at 6. In the absence of evidence to support a discovery of a valuable

² The description of the claim in the 1958 amendment was the same as that in the original certificate. The 1961 amendment described it as S $\frac{1}{2}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$, sec. 13, T. 43 N., R. 11 W., N.M.P.M.

³ Prior to the Act of Aug. 12, 1953, 30 U.S.C. §§ 501-505 (2006), and the Multiple Mineral Development Act of Aug. 13, 1954, 30 U.S.C. §§ 521-530 (2006), mining claims located after the Mineral Leasing Act of Feb. 25, 1920 (MLA), 30 U.S.C. § 181 *et seq.* (2006), for lands which were known to be valuable for MLA minerals were regarded as void *ab initio*. *See United States v. Long Beach Salt Co.*, 23 IBLA 412, 415 (1975). The Mineral Report noted that the claim was located after Feb. 10, 1954, the last date that such a claim could qualify for relief under the Act of Aug. 12, 1953, and prior to the Act of Aug. 13, 1954, 30 U.S.C. § 521 (2000), which also made provision for mining claims on lands subject to oil and gas leases. MR at 6. A claim located during that period is properly deemed null and void *ab initio*. *Alumina*

(continued...)

mineral deposit, and given Robinson's admission that few if any efforts had been made to explore and develop the claim, the examiner stated his opinion that the claim was invalid for lack of good faith, lack of compliance with the mining law, and lack of discovery of a valuable mineral deposit. MR at 17-18.

In determining the location of the claim, however, BLM's mineral examiner described in detail a number of problems involving surveys that impelled him to conclude that the claim that Robinson described on the ground "was at serious variance with the description contained in the Location Certificate." MR at 7-12. Because of the uncertainty as to whether the claim was on public lands or patented lands, the examiner concluded that there was no reason at that time to take adverse action and that a survey would first be required in order to precisely locate the land Clegg occupied. If it was found that Clegg's improvements were on public land, the examiner recommended that corrective measures be taken for his benefit in light of his improvements. *Id.* at 18. However, the examiner believed that the cost of a survey could not be justified. MR at 19.

After completion of the Mineral Report, BLM sent a letter to Clegg dated September 29, 1964, stating that "there is some doubt that your improvements are within the boundaries of the mining claim as it is described in the location certificate filed," questioning whether the mining claim was valid, and informing him that the land would be surveyed in 1965. However, no survey was initiated. In a September 9, 1965, letter to the Cleggs, BLM could not commit to when a survey would occur.

In a letter dated June 1, 1967, BLM responded to an inquiry from Clegg concerning the MCOA, stating that an application must be filed by October 22, 1967, and reminded him of the need for surveying, stating that "[b]efore any action can be taken to legalize your occupancy of the land, we must determine whether your improvements are on public lands or on the patented homestead." On September 15, 1967, the Cleggs filed an MCOA application, requesting fee title to 5 acres.⁴ In a letter dated October 26, 1967, BLM reminded the Cleggs that "an official government survey" would be required to determine whether his house and other improvements

³ ...continued)

Development Corp. of Utah, 67 L.D. 68, 76 (1960).

We note that even though the claim may have been null and void *ab initio*, it would have provided a proper basis for a conveyance to a *qualified* applicant under the Mining Claims Occupancy Act, 30 U.S.C. § 701 (2006), because that statute pertains to invalid or relinquished claims. See *Feliciano Y. Jimenez*, 30 IBLA 82, 85 (1977).

⁴ The pertinent provisions of the MCOA are set forth and discussed below.

were on public lands, but stated “it may be a matter of years before the survey may be made.” Finding no purpose in holding the application in abeyance pending completion of the survey, BLM notified the Cleggs that it was closing the application. The letter concluded:

Your rights will not be impaired by this action at this time. If and when an official survey is completed, we will then know whether your residence is on government land. If it develops that it is on government land, we will give every consideration to the filing of an application *under existing law and regulations at that time.*

(Emphasis added.) The emphasized words make it clear that any new application would not be filed under the MCOA if that law were no longer in effect when the survey was completed.

Clegg became concerned that he would predecease his wife and did not wish to leave his occupancy unresolved. In a letter to BLM dated October 9, 1968, the Cleggs proposed an exchange involving other land that he had arranged to purchase, but BLM declined because of “the survey problems.” BLM letter to the Cleggs dated Oct. 21, 1968. In 1964 and 1971, BLM requested a survey of the Cleggs’ parcel, but no “accurate survey of the area” was completed until 1982.⁵ See Answer at 4.

By that time, however, the Cleggs no longer owned the claim, having quitclaimed it to Lucille Lowry in 1978. Appellants began to rent the claim in 1982 with an option to buy it. Lowry conveyed the improvements to appellants by bill of sale and separately conveyed any interest in the claim she had by quitclaim deed in 1993. Appellants sought to pay taxes on the land, but San Miguel County refused because of a survey problem, unaware that a survey had been completed in 1982. See SOR at 5.

It was not until September 28, 2004, that BLM filed an initial report of unauthorized use on the basis of a survey retracing property lines in the area. On

⁵ The field notes and survey plat are not in the record and, accordingly, it is not clear whether the work completed in 1982 was, in whole or in part, a resurvey. In keeping with most of the correspondence in the record, we will continue to refer to the 1982 activity as a “survey.” That survey showed that the Cleggs’ improvements were not located in the SW $\frac{1}{4}$ of sec. 13 (as described in Robinson’s Location Certificate) or on patented land in the NE $\frac{1}{4}$ of sec. 13, but rather on other public lands now described as the SW $\frac{1}{4}$ SE $\frac{1}{4}$, sec. 13, T. 43 N., R. 11 W., N.M.P.M. See Notice of Trespass; see also two maps attached to Apr. 9, 2007, letter from BLM to appellants’ counsel. The results of the survey apparently were not provided to appellants until BLM sent them the Notice of Trespass in 2005.

that date, BLM issued a letter addressed to “Occupant” stating that unauthorized uses of the public land constitute a trespass and advised the recipient of the need to discuss the matter immediately. Siegel telephoned BLM that same day and described her own records about the history of the occupancy. Appellants met with BLM on October 8 and again on November 19 with their attorney. On February 25, 2005, BLM issued the Notice of Trespass.

Appellants’ counsel responded by letter dated March 24, 2005, objecting that BLM’s trespass notice came “almost 40 years after the matter could have been resolved under then-existing legislation designed to address precisely the type of difficult situations in which our clients now find themselves.” He asserted theories of estoppel to support a right of a patent under the MCOA. BLM responded in a letter dated August 28, 2006, stating that appellants’ arguments had been carefully considered, but were not persuasive. BLM allowed appellants 30 days to provide additional reasons for their occupancy, but stated that in the absence of persuasive reasons, BLM would issue a decision offering a 1-year nonrenewable permit to enable them to relocate their improvements. Over the next year, BLM and appellants attempted to resolve the occupancy issue. Appellants pressed their arguments under the MCOA; BLM considered options involving a land exchange or lifetime permit.

In a letter dated November 2, 2007, BLM explained its opinion that neither appellants nor their predecessors could qualify as applicants under the MCOA because they did not meet the residency requirements of that statute. BLM expressed its willingness to offer appellants a 3-year permit to give them time to consider options that included a lifetime lease and a land exchange. Subsequently, appellants and their counsel met with BLM and appellants stated that they would submit a color of title application. That application was accompanied by a December 19, 2007, letter in which counsel for appellants responded to issues raised at meetings and in previous correspondence by continuing to press arguments under the MCOA and requesting a formal process of alternative dispute resolution.

BLM’s DECISION

In its May 1, 2008, decision, BLM rejected appellants’ argument that they had a property right to the land occupied by their house. BLM found that the mining claim was invalid because no claim under the MCOA could be asserted after June 30, 1971, and even if the law were still in force, neither appellants nor their predecessors in interest could qualify under that Act. Further, whatever rights appellants’ predecessors may have had under the MCOA could not be assigned to appellants under 30 U.S.C. § 708 (2006). Decision at 2. BLM rejected appellants’ argument that it was equitably estopped from proceeding with its trespass action, stating that

there had been no “affirmative misconduct” and that none of the other elements required for estoppel were satisfied.⁶

BLM also rejected appellant’s application under the Color of Title Act, 43 U.S.C. § 1068 (2000). That statute provides for issuance of a patent for up to 160 acres upon a showing

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.

A claim is not held in good faith where held with knowledge that the land is owned by the United States. 43 C.F.R. § 2540.0-5(b); *see Day v. Hickel*, 481 F.2d 473, 477 (9th Cir. 1973). Because appellants were aware that their land was on an unpatented mining claim which can only occur on land owned by the United States, BLM concluded that appellants cannot meet the good faith requirement. Decision at 2.

After outlining regulations governing trespass on public lands,⁷ BLM stated its intent to minimize impact on appellants while still adhering to applicable law. BLM offered appellants a revocable 3-year permit to give them time to consider proposing a lease for life or a land exchange to legitimize their occupancy. Appellants responded by applying for a land use permit while filing an appeal from the decision.

⁶ Appellants have argued that under principles of estoppel, the expiration of the MCOA should not operate to their prejudice, citing *United States v. Wharton*, 514 F.2d 406 (9th Cir. 1975). SOR at 10. In *Wharton*, 514 F. 2d at 412, the Court identified four elements for estoppel against the government in addition to affirmative misconduct: (1) the party to be estopped must know the facts; (2) he must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended; (3) the latter must be ignorant of the true facts; and (4) he must rely on the former’s conduct to his injury. Appellants argue that BLM’s failure to respond to Clegg’s “entreaties” combined with BLM’s completion of a survey and failure to notify the Cleggs rise to the level of affirmative misconduct. SOR at 13.

⁷ BLM referred to 43 C.F.R. § 2920.1-2, which provides that any unauthorized use, occupancy, or development of public lands, other than casual use, is considered a trespass. BLM referred to 43 C.F.R. § 9262.1, which provides for penalties for trespass.

Their SOR focuses on the rejection of their applications under the MCOA and Color of Title Act.

MINING CLAIMS OCCUPANCY ACT

Because appellants mainly focus their appeal on the Cleggs' MCOA application, we will review the reasons why that statute was enacted before considering appellants' arguments. Courts have long recognized that the right to use the surface and surface resources of a mining claim was limited to uses "reasonably necessary in the legitimate operation of mining," *Teller v. United States*, 113 F. 273, 280 (8th Cir. 1901), or "incident to mining operations," *United States v. Rizzinelli*, 182 F. 675, 684 (D. Idaho 1910). Occupancy of a mining claim for purposes not related to mining operations constitutes a trespass for which the Government can collect damages. *E.g.*, *United States v. Nogueira*, 403 F.2d 816, 825 (9th Cir. 1968). Recognizing that "[s]ome locators in reality, desire their mining claims for commercial enterprises such as filling stations, curio shops, cafes, or for residence or summer camp purposes,"⁸ Congress enacted the Surface Resources Act of July 23, 1955, subsection 4(a) of which provides that mining claims located under the mining laws of the United States "shall not be used, prior to issuance of patent therefor, for any purposes other than prospecting, mining or processing operations and uses reasonably incident thereto." 30 U.S.C. § 612(a) (2006).⁹ "This law has resulted in an intensified program to eliminate uses of mining claims inconsistent with mining purposes." *Funderberg v. Udall*, 396 F.2d 638, 639 (9th Cir. 1968), quoting S. Rep. No. 1984, 87th Cong., 2d Sess. (1962), p. 3.

In 1962, Congress recognized that there were "hundreds of unpatented mining claims" that had "been used, sometimes for generations, as actual homesites and as a principal place of residence, by families which have inherited them from the original locators, or paid value for the improvements, in reliance upon the customs prevailing in the area that effective title could be obtained by gift, inheritance, or quitclaim deed." S. Rep. No. 1984, 87th Cong., 2d Sess. (1962), p. 4. Out of sympathy for the plight of such people, Congress enacted the MCOA. *Id.* In *Funderberg*, the court found that the purpose of the statute was "to relieve the hardship which would be visited upon persons who were living on their unpatented claims, but would be evicted under the 1955 statute . . . and would 'have no place to go' if the relief

⁸ H. Rep. No. 730, 84th Cong., 1st Sess., reprinted in 1955 U.S. Code Cong. & Ad. News at 2479.

⁹ Although the statute made the quoted provision applicable to claims located after July 23, 1955, we have stated that this provision was "simply declaratory of the law as it existed prior to 1955," citing the *Teller* and *Rizzinelli* cases. *Bruce W. Crawford*, 86 IBLA 350, 364, 92 I.D. 208, 216 (1985).

proposed in the 1962 bill was not granted.” 396 F.2d at 640 *citing* Hearings, S. Committee on Interior and Insular Affairs, S. 3451, 87th Cong., 2d Sess. (1962), pp. 11-12, reprinted in U.S. Code Cong. & Ad. News 1962, at p. 1326).

Section 1 of the MCOA, 30 U.S.C. § 701 (2006), provides the Secretary discretionary authority to convey an interest, up to and including fee simple, for up to 5 acres in the area within an unpatented mining claim to any occupant thereof, who is deemed to be a “qualified applicant” and who “applies therefor within the period ending June 30, 1971.” An applicant is deemed to be “qualified” if he is “a residential *occupant-owner*, as of October 23, 1962, of valuable *improvements* in an unpatented mining claim *which constitute for him a principal place of residence* and which he and his *predecessors in interest were in possession of for not less than seven years prior to July 23, 1962.*” 30 U.S.C. § 702 (2006) (emphasis added). As the emphasized language makes clear, it is not sufficient that the *claim* be used as a principal place of residence by an applicant or his predecessors in interest, but the *improvements* on which an application is based must have constituted a principal place of residence for the applicant or his predecessors in interest on during the qualifying period. *See Mildred L. Cox*, A-30976 (Mar. 14, 1969), at 5. This interpretation is consistent with Congressional intent to benefit only those who might be evicted from their long-established homes. Similarly, the scope of relief was limited by providing: “Rights and privileges to qualify as an applicant under this chapter shall not be assignable, but may pass through devise or descent.” 30 U.S.C. § 708 (2000); *see Ola McCulloch Sibley*, 73 I.D. 53, 60, n.6 (1966).

Thus, the relief provided under the MCOA was intended to be quite limited. Initially, applicants were only provided a 5-year period to file their applications, although Congress extended that deadline to June 30, 1971. The MCOA did not *require* the Secretary to issue a conveyance to a qualified applicant; an applicant had only “a potential privilege to receive a conveyance of United States land.” *United States v. Walker*, 409 F. 2d 477, 481 (9th Cir. 1969). The Secretary had discretionary authority to give an applicant a lesser interest such as a lease. *United States v. Brown*, 672 F.2d 808 (10th Cir. 1982); *see also Harry E. Hawkenson*, 13 IBLA 237 (1973); *Arland E. Purington*, 10 IBLA 118 (1973).¹⁰ Further, by precluding assignment of the

¹⁰ The *Brown* case involved a parcel of land only a few miles away from appellants’ land that was also in an area where there was no adequate survey on which to base a patent. The court recognized that BLM did not abuse its discretion under the MCOA when it granted only a leasehold interest and later declined to extend the lease when the claim was no longer being used as a principal place of residence and had been transferred. In this appeal, BLM’s failure to take further action on the Cleggs’ application until a survey was completed enabled the Cleggs to live on the claim for a much longer period than that involved in the *Brown* case.

ability to qualify as an applicant, Congress made clear its intention to limit relief only to those who would otherwise be evicted or their heirs or devisees, not those who purchased a claim that is subject to an application.

Appellants contend that the MCOA had the objective of granting applicants maximum tenure and assert it to be undisputed that the Cleggs would have been given fee simple title because the Government had no other use for the land. SOR at 7. However, the cases cited in the preceding paragraph refute this argument. Also, in their effort to revive the Cleggs' MCOA application, appellants essentially argue that BLM had a duty to keep the Cleggs' application in suspense until a survey was completed, to notify them that a survey had been completed, and then consider their MCOA application and issue a patent conveying fee title. They assert that BLM is estopped from doing otherwise because its October 26, 1967, letter advised the Cleggs that their "rights will not be impaired" by the return of the application and the closing of the file and the promise that BLM would "give every consideration to the filing of an application." As BLM points out, however, there was no promise to consider an MCOA application, but only to consider an application "under existing law and regulations at that time," and no new claim was filed by the Cleggs before the June 30, 1971, deadline. Thus, BLM's discretionary authority to approve an application under the MCOA terminated with the expiration of the extended filing period under the MCOA.

We need not give detailed consideration to the lengthy arguments provided by appellants and BLM under the MCOA because BLM is correct in contending that the Cleggs were ineligible for a conveyance under the MCOA because they had not resided on the claim during the requisite 7-year period prior to July 23, 1962.¹¹ Answer at 9-12. Even if they were eligible, any assignment of their rights under the application to Lowry and to appellants was precluded by 30 U.S.C. § 708 (2006).¹²

¹¹ Although appellants contend that the Cleggs qualified because the claim served as a principal place of residence for Robinson, Reply to Answer at 1-3, Robinson's improvements were on the north half of the claim, not the south half where the Cleggs built their house in 1962. Thus, the Cleggs were ineligible because they were not successors in interest to the *improvements* that may have served as a principal place of residence during the qualifying period. See 30 U.S.C. § 702 (2006).

¹² In *Eugene P. Tiscornia, Sr.*, 13 IBLA 136, 141 (1973), we recognized that 30 U.S.C. § 708 (2006) "permits the tacking of possession by a grantee or purchaser during the period between July 23, 1955, and October 23, 1962," so that the Cleggs would have qualified if they had purchased the improvements that were Robinson's principal place of residence. However, we also recognized that "a residential occupant-owner whose qualifications have matured as of October 23, 1962, . . . cannot transfer such
(continued...)"

As we have often stated, persons dealing with the Government are presumed to have knowledge of relevant statutes and regulations. *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380 (1947). Thus, the Cleggs and any purchasers of their claim are charged with specific notice that once the claim was transferred, any right assertable under the MCOA ended.¹³

[1] Although appellants contend that they are not acting as “assignees,” but merely seek the processing of the Cleggs’ original application, the statutory prohibition on assignments cannot be so easily circumvented. Issues concerning the assignability of rights to apply for and select land have a long history in this Department. *See, e.g., Ben Cohen (On Judicial Remand)*, 103 IBLA 316, 322-26, 330-33, *aff’d sub nom. Sahni v. Watt*, Civ. No. S-83-96-HDM (D. Nev. Jan. 17, 1990), *aff’d*, (Jan. 14, 1991), *aff’d*, 961 F.2d 217 (Table) (9th Cir. 1992), and cases cited therein.¹⁴ In cases where a land selection right was not assignable, the Government has no obligation to deal with a transferee. *Udall v. Battle Mountain Co.*, 385 F.2d 90, 93-94 (9th Cir. 1967).¹⁵ In *Battle Mountain*, the court held that if one who holds a selection right

chooses to contract privately for the sale of his interest in selected lands in advance of their being patented to him, his transferee has no privity

¹²(...continued)

rights and privileges by assignment.” *Id.* Thus, even if the Cleggs had purchased Robinson’s improvements, they could not transfer their rights and privileges to others except by devise or descent.

¹³ Although appellants attempt to assert estoppel against BLM, courts have recognized that the enactment of the legislation itself imparts adequate notice of its requirements, *United States v. Locke*, 471 U.S. 84, 107-108 (1985), so appellants are unable to show that they are “ignorant of the true facts,” a necessary element to support a finding of estoppel. *See United States v. Georgia-Pacific Co.*, 421 F.2d 92 (9th Cir. 1970).

¹⁴ The *Cohen* case explains how land dealers sought to circumvent restrictions on assignability of a land selection right through the use of two powers of attorney—one to make the entry and the other to sell the land when entered. A person acting under a power of attorney could act on behalf of the principal, but any conveyance would be issued in the name of the principal. *See Cohen*, 103 IBLA at 320-24. In the instant appeal, appellants assert no power of attorney to seek conveyance of the land on Clegg’s behalf, but in any event, such a power would have ended when Clegg was no longer the owner of the claim or upon his death. *See id.* at 324 n.7.

¹⁵ The *Battle Mountain* case involved forest lieu selection rights based on the Act of June 4, 1897, 30 Stat. 36, and the Act of Mar. 3, 1905, 33 Stat. 1264.

with the Government, will not be recognized by it and can make no demands upon it; and that no questions arising between the owner and his transferee upon such sale are any concern of the Government's.

Id. at 94. In this case, Congress explicitly provided that rights under a MCOA application were not assignable, so appellants' purchase of the Cleggs' claim places BLM under no obligation to deal with them on the matter of the Cleggs' MCOA application. Accordingly, we find that BLM properly returned the application.

COLOR OF TITLE ACT

[2] The Color of Title Act, 43 U.S.C. § 1068 (2000) (COTA), provides for issuance of a patent for up to 160 acres upon a showing “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.”¹⁶ The burden of proof is on the applicant to prove each element of his claim, and failure to satisfy this burden as to any element is fatal to his application. *Mike Hook and Dr. Robert Flannigan*, 174 IBLA 73, 75 (2008), and cases cited. A claim is not held in good faith where held with knowledge that the land is owned by the United States. 43 C.F.R. § 2540.0-5(b); *see Day v. Hickel*, 481 F.2d 473, 477 (9th Cir. 1977). We have affirmed BLM decisions rejecting applications for lack of good faith when an applicant or predecessor-in-interest showed prior knowledge of Federal ownership by filing an application with BLM at some earlier time. *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). Because appellants were aware that the land they claimed was on an unpatented mining claim, which may only occur on land owned by the United States, BLM concluded that appellants must have been aware of the United States ownership and, thus, cannot meet the good faith requirement, citing our decision in *Silverado Nevada, Inc.*, 152 IBLA 313, 324 (2000), where we stated: “[A] deed that conveys an unpatented mining claim cannot as a matter of law serve as the basis for a claim of color of title to the land described, just as a deed conveying a right-of-way or grazing lease could not. *See Joe Stewart*, 33 IBLA 225, 229 (1977);

¹⁶ An application under this provision is called a Class 1 claim. 43 C.F.R. § 2540.0-5(b). A Class 2 claim is one which has been held in good faith and in peaceful, adverse possession by a claimant, his ancestors or grantors, under claim or color of title for the period commencing not later than 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.

Carmen M. Warren, 69 IBLA 347, 349 (1982).” See also *Purvis C. Vickers*, 67 I.D. 110 (1960).

Appellants, however, point to our statement in *Silverado* that “knowledge that the title is uncertain is neither knowledge that title belongs to the United States nor a basis to find that it was unreasonable for [the applicant] to believe it had title.” 152 IBLA at 331. Appellants assert that neither they nor their predecessors can be charged with knowledge that title was in the United States because BLM stated in its June 1, 1967, letter to the Cleggs that title is uncertain. See SOR at 18-19.

Although appellants and BLM rely on the *Silverado* decision to support their opposing arguments, that case involves unique circumstances that warrant the exercise of caution before applying it to other cases. *Silverado* involved a quiet title action in State and Federal court to determine title to mining claims based upon the interpretation and effect of a quit claim deed from the United States and the Reconstruction Finance Corporation (RFC). Because this was a conveyance from the United States, the private parties apparently assumed that it conveyed fee title, even for the claims that had not been previously patented. 152 IBLA at 315-16. Reversing the trial court, the State appellate court concluded that only a possessory interest had been conveyed. On remand, the case was removed to the Federal district court, which quieted title in the United States. On appeal, the U.S. Ninth Circuit Court of Appeals was divided on the issue of whether the deed contained an ambiguity, but affirmed because the intent of the parties was to convey only the claims and not fee title. *Id.* at 317-18. The Board rejected BLM’s argument that the pendency of the judicial proceedings put *Silverado*, as successor to the interest conveyed by the United States and the RFC, on notice that either the United States had title to the land or *Silverado*’s claim to good faith was precluded as a matter of law. *Id.* at 331. The Board acknowledged *Silverado*’s arguments that it may have held the claims in good faith until the litigation concluded, but it found that the 20-year period for good faith possession extended to a time before the claims were transferred to *Silverado*. *Id.* at 332-33. Although it found that one of *Silverado*’s predecessors in interest may have been aware that the United States retained fee title, the Board rejected BLM’s arguments that such knowledge could be imputed to *Silverado*, specifically concluding that deficiencies in the record precluded *any finding* on the issue of good faith. *Id.* at 333.

BLM relies on our statement in *Silverado* that a “deed that conveys an unpatented mining claim cannot as a matter of law serve as the basis for a claim of color of title to the land described,” *Id.* at 329. In the same case, we also concluded that there was *no basis* in the record for *any finding* on the issue of good faith. *Id.* at 333. However, in *Cripple Creek Gold Production Corp.*, 53 IBLA 188 (1981), the Board had previously rejected an argument that a title derived from an unpatented

mining claim *necessarily* requires the conclusion that the applicant lacks good faith. That case concerned a quitclaim mining deed in the chain of title indicating on its face that the claim had been “entered for patent.”

On the question of whether possession of the land was held “with knowledge that the land is owned by the United States,” the Board in *Cripple Creek* acknowledged that this language might be read to require *actual knowledge on the part of some holder*, within the statutory time frame, *that title was in the United States*. (Emphasis added in part.) We noted Board precedent that had approached the issue in terms of “examining the evidence to ascertain whether it was probable that the holder knew that title was in the United States.” 53 IBLA at 190, and cases cited. However, we also noted that “other decisions have tested the good faith of an applicant by considering whether he had *good reason to know* that he did not receive title through the conveyance on which he relies,” *id.*, commenting on instances in which the appellants had reason to know that title was in the United States, and that therefore they were not good faith possessors. As an example, we cited *Joe I. Sanchez*, 42 IBLA 176 (1979), in which the Board affirmed an Administrative Law Judge’s finding that in the circumstances presented, Sanchez “knew or *certainly should have known* that [the subject lands] were public lands.” (Emphasis in the original.) Similarly, in *Joe Stewart*, 33 IBLA at 229, where the applicant and his two predecessors held a right-of-way over the land in question granted by the United States and had received periodic trespass notifications from Federal officers, we concluded that the appellants had reason to know the United States owned the land. *See also John S. Cluett*, 52 IBLA 141, 145 (1981) (“It is not unreasonable to conclude from the evidence that [applicant’s predecessor in interest] had reason to know in early 1906 that the State selection for the land he was seeking had been canceled and that title to the land was in the United States.”).

In *Cripple Creek*, the sole indication of the United States’ title was the phrase “entered for patent” in the quitclaim deed. Finding that although this language might “alert someone with a thorough and comprehensive knowledge of public land law that further inquiry would be well advised, every citizen cannot be charged to exercise that degree of sophistication,” 53 IBLA at 191, the Board was not persuaded that this circumstance was comparable to those presented in *Joe I. Sanchez*, *Joe Stewart*, and *John S. Cluett*. We cited *Lawrence E. Willmorth*, 32 IBLA 378, 381 (1977), in which we held that “[i]n determining whether the claimant honestly believed that there was no defect in his title, the Department may consider whether his belief was unreasonable in the light of the facts then actually known to him” and, applying the *Willmorth* test, concluded that BLM’s finding of lack of good faith could not be sustained. 53 IBLA at 191. *Silverado* did not overrule *Cripple Creek* and should not be construed as an impeachment of its reasoning, or that of *Willmorth*.

What *Cripple Creek* does require is some basis in the record for an honest belief by an applicant and his predecessors in interest that they have title to the land. See *Joe T. Maestas*, 149 IBLA 330, 334 (1999), and cases cited. *Silverado* cannot be construed as substituting mere “uncertainty” for this requirement because we there recognized that Silverado may have had a basis for an honest belief until litigation over the title concluded. See 153 IBLA at 332. Although BLM’s 1967 letters to the Cleggs stated that a survey was necessary to determine whether their improvements were on public land, this provided no reasonable basis for the Cleggs or their successors to believe that they had title in light of the facts known to them; the only uncertainty was whether the Cleggs’ house was on land owned by BLM or on land owned by the successor in interest to the homestead patent. Therefore, we conclude that appellants have failed to satisfy their burden to prove that they and their predecessors in interest held the land in the good faith belief that they had title, which is fatal to their color of title application. *Mike Hook and Dr. Robert Flannigan*, 174 IBLA at 75, and cases cited.

Although we are not unsympathetic with appellants’ plight, we agree with BLM that neither the MCOA nor the Color of Title Act gives authority to convey land to them under the circumstances of this case.

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.

_____/s/
 R. Bryan McDaniel
 Administrative Judge

I concur:

_____/s/
 T. Britt Price
 Administrative Judge