

INTERIOR BOARD OF LAND APPEALS

Louis C. Scalise

129 IBLA 334 (May 31, 1994)

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Appeal from a decision of the Acting Area Manager, Walker Resource Area, Nevada, Bureau of Land Management, rejecting class 1 color-of-title application N-54719.

Affirmed.

1. Color or Claim of Title: Applications--Color or Claim of Title: Good Faith

Good faith, as that term is used in the Color of Title Act, 43 U.S.C. § 1068 (1988), requires that a claimant and his predecessors-in-interest honestly believe that no defect exists in the title to the land claimed. In making the determination of whether the claimant honestly believed that there was no defect in title, the Department may consider the reasonableness of such a belief in light of the facts actually known to the claimant.

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

In order for an access road to constitute a valuable improvement under the Color of Title Act, it must enhance the value of the land for the purpose to which it is devoted at the time of filing the application.

3. Color or Claim of Title: Generally--Color or Claim of Title: Cultivation

A determination that a color-of-title applicant has not satisfied the cultivation requirement will be affirmed on appeal where the land contains no evidence of activities relating to crop production and the claimant fails to demonstrate how the clearing of some trees would satisfy the cultivation requirement.

APPEARANCES: Sandra-Mae Pickens, Esq., Carson City, Nevada, for appellant.

## OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

Louis C. Scalise has appealed from a December 9, 1991, decision of the Acting Area Manager, Walker Resource Area, Nevada, Bureau of Land Management (BLM), rejecting his class 1 color-of-title application N-54719.

Scalise filed his application on June 7, 1991, pursuant to section 1 of the Color of Title Act, as amended, 43 U.S.C. § 1068 (1988), for 40 acres of land described as the NE $\frac{1}{4}$  SE $\frac{1}{4}$  sec. 36, T. 18 N., R. 20 E., Mount Diablo Meridian, Storey County, Nevada. 1/

Under the Color of Title Act, as amended, 43 U.S.C. § 1068 (1988), a class 1 color-of-title applicant 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. The applicant must also establish that valuable improvements have been placed on the land or that some part of the land has been reduced to cultivation. 43 CFR 2540.0-5(b); John P. & Helen S. Montoya, 113 IBLA 8, 13-14 (1990).

In response to the question on the application form, "[o]n what date did you first learn that you did not have clear title," Scalise responded, "[i]ssue is still yet to be determined." With regard to questions of cultivation of the land or improvements thereon, Scalise stated in the application that the land had been cultivated in 1971-72, 1978-79 and 1985 and that "[p]erimeter roads, roads through property, fire roads, burn removal" had been constructed as improvements to the property.

In its decision, BLM concluded that Scalise had failed to show a claim being held in good faith and in peaceful adverse possession for more than 20 years. That conclusion was based on BLM's determination that the claim of adverse possession originated on October 26, 1970, but terminated prior to July 1988 when Scalise was "informed by an authorized officer of BLM that the lands now encompassed by the subject application were public lands" (Decision at 1). BLM also concluded that no valuable improvements had been placed on the land and that no part of the land been reduced to cultivation. BLM's findings and conclusion were based on a Land Report, dated November 14, 1991. 2/

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1/ That land is elsewhere described in the record as "Parcel no. 291-S."

2/ The Land Report states that on Sept. 30, 1957, the Curtiss-Wright Corporation took title to the N $\frac{1}{2}$ , SW $\frac{1}{4}$ , S $\frac{1}{2}$  SE $\frac{1}{4}$ , NW $\frac{1}{4}$  SE $\frac{1}{4}$  of sec. 36 through issuance of a patent in connection with a land exchange and that the patent specifically excluded the land at issue here, the NE $\frac{1}{4}$  SE $\frac{1}{4}$ . Thereafter, on Oct. 26, 1970, the Curtiss-Wright Corporation improperly conveyed all of sec. 36 to the Lake Tahoe Recreational Land Company, Inc. Thus, appellant's chain of title began with the Curtiss-Wright Corporation's error in describing the land conveyed to Lake Tahoe Recreational Land Company, Inc. (BLM Report at 3).

On appeal, appellant disputes BLM's finding that his good faith ended prior to July 1988. He states:

In 1988, Mr. Scalise contacted BLM regarding a question that had been raised as to his title. As early as 1988, John Matthiessen, of BLM for whatever reasons, could not conclusively determine whether or not the land in question was public land, leaving Mr. Scalise little choice but to pursue an investigation pursuant to a policy of title insurance. Surprisingly, the title company which had issued a title policy continually failed to conduct an investigation to confirm Mr. Scalise's title.

Appellant insists that one must know the land in question is owned by the Government to negate the good faith requirement, citing Day v. Hickel, 481 F.2d 473 (9th Cir. 1973). Appellant denies that he "had any direct knowledge of the government's title until advised by BLM in May of 1991, that he needed to file a Color-of-Title application" (Statement of Reasons (SOR) at 2-3).

We have recognized that an applicant under the Color of Title Act has the burden of proof to establish to the Secretary of the Interior's satisfaction that the statutory requirements for purchase under the Act have been met. Shirley & Pearl Warner, 125 IBLA 143, 148 (1993); John P. & Helen S. Montoya, *supra*; Hal H. Memmott, 77 IBLA 399, 402 (1983). The applicant must establish that each of the requirements for a class 1 claim have been satisfied and failure to carry the burden of proof with respect to any one of the elements is fatal to the application. See Shirley & Pearl Warner, *supra*; Rio Grande Conservancy District, 86 IBLA 41, 42 (1985); Jerry G. Perry, 85 IBLA 93, 94 (1985).

[1] "A claim is not held in good faith where held with knowledge that the land is owned by the United States." 43 CFR 2540.0-5(b). The good faith requirement has been further refined by decisions of this Board in which we have held that good faith requires the honest belief of ownership of the land. E.g., Patti L. Keith, 100 IBLA 89, 92 (1987). In determining whether the applicant honestly believed that there was no title defect, the Department may consider the reasonableness of such belief in light of facts actually known to the applicant. *Id.*; Lawrence E. Willmorth, 64 IBLA 159, 160 (1982), *aff'd*, Willmorth v. Watt, No. C-82-518-JLQ (E.D. Wash. July 27, 1987).

The record does not support appellant's assertion that he did not have any direct knowledge of the Government's claim to the land until May 1991. One of the documents included by appellant as Exhibit A to his SOR is a letter dated March 5, 1991, from counsel for appellant to Western Title Company, Inc., stating: "After having purchased the property in 1984, Mr. Scalise was notified by the Federal Government that it retained title to Parcel 291-S and that consequently, no prior conveyances of this property were effective." While that letter does not provide the date on which "Mr. Scalise was notified by the Federal Government" that he did not hold title to the land, the case record includes a memorandum to the file, dated

November 12, 1991, from the Walker Resource Area Manager, John Matthiessen, in which Matthiessen represents that at some point prior to July 1988 he informed appellant that the parcel in question was public land. <sup>3/</sup> This is evidence that appellant "was notified by the Federal Government that it retained title."

Although appellant admits that he contacted BLM in 1988 regarding the status of the parcel, he asserts that "for whatever reasons, [Matthiessen] could not conclusively determine whether or not the land in question was public land" (SOR at 2). It does not seem likely that if the Master Title Plat, as Matthiessen states, and appellant does not dispute, showed the land in 1988 to be public land that Matthiessen would have had any difficulty in representing the land as public land. In the face of a deed conveying the land to him, perhaps appellant did not consider Matthiessen's representation to be "conclusive," and, in fact, it would appear that even at the time appellant filed his application, he did not consider the title question to be settled. <sup>4/</sup> However, what is important in considering the good faith question is not the applicant's subjective belief, but whether based on the facts available to the applicant, the applicant could have reasonably believed that there was no defect in title to the parcel in question. See Kim C. Evans, 82 IBLA 319, 321 (1984).

We believe it may be concluded from the record in this case that appellant knew at some point before the end of the 20-year period commencing on October 26, 1970, that there was a defect in his title to Parcel No. 291-S.

Nevertheless, even if that conclusion could not be made based on the present record, appellant's color-of-title application fails because he has shown neither the existence of valuable improvements on the land nor cultivation.

The law is well settled that land being sought under the Color of Title Act must either contain valuable improvements erected by the applicant or his predecessor or be under cultivation. 43 U.S.C. § 1068 (1988). Valuable

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<sup>3/</sup> Matthiessen stated in the memorandum that based upon his notes and his memory he recalled that appellant had called to inquire regarding the status of the land in question and that "I checked the Surface Management Map during the course of the initial conversation and told him that the map indicated the parcel to be public land but that to be positive I would check the Master Title Plat (MTP) and call him back. Within the hour I verified that the MTP showed the parcel to be public land."

<sup>4/</sup> As noted above, in response to the question on the application requesting the date on which appellant first learned that he did not have clear title, he stated: "Issue is still yet to be determined." We note, however, that a color-of-title applicant may not contest Government ownership of the land sought. Loyola C. Waskul, 102 IBLA 241, 244 (1988), and cases cited therein. Thus, by filing a color-of-title application, the applicant necessarily concedes that title lies in the United States and seeks conveyance of the actual title from the United States. Shirley & Pearl Warner, *supra*.

improvements claimed must exist on the land at the time the application was filed and must enhance the value of the land. John P. & Helen S. Montoya, *supra* at 16; Jerry G. Perry, *supra*.

Regarding appellant's alleged improvements, BLM's Land Report states at page 2: The application lists improvements as, "Perimeter roads, roads through property, fire roads, burn removal." The roads in the area stop before or at the boundary of the parcel. These roads are Buckeye Road and Globe Road and are part of the road net for the Highland Ranches subdivision. The "roads" on the parcel are jeep trails and consist of two parallel ruts without significant improvement. The Random House College Dictionary, Revised Edition (1980) defines a road as "a long narrow stretch with a smoothed or paved surface, made for traveling by motor vehicle, carriage etc." and defines a "trail" as a "path or track made across a wild region, over rough country, of the like by the passage of men or animals." What exists on the parcels are trails which incidentally cross the parcel. The only other manmade features are the bulldozed fire lines used to stop a wildfire. These fire lines are simply cleared lines to remove fuel from the path of the fire and cannot be considered fire roads. There is no evidence of burn removal from the parcel as the wildfire which occurred was stopped to the west of the parcel. There is no evidence of a fire on the parcel such as burned stumps. While the claimed improvements may be on the parcel there is no evidence they were constructed for the benefit of the parcel and they do not enhance the value of the land sought. Malcolm C. and Helena M. Huston, 80 IBLA 53 (1984).

On appeal, appellant insists that the property currently possesses two access roads, both of which are maintained (SOR at 3). He describes one as providing access to the property and the other as a "fire access road which goes across the property." *Id.*

[2] Access roads alone, even if they do exist on Parcel No. 291-S, do not constitute valuable improvements. Gladys Lomax, 75 IBLA 89, 91 (1983). In order for an access road to constitute a valuable improvement, it must enhance the value of the land for the purpose to which the land is devoted at the time of filing the application. In Virgil H. Menefee, A-30620 (Nov. 23, 1966), the Department concluded that a trail or road constituted a valuable improvement where it was used in connection with grazing activities on the land in question. On the other hand, in Lomax, we held that a dirt road leading to the area of an abandoned gas well and a trail passing through the property did not qualify as valuable improvements because neither enhanced the value of the land in question. Likewise, we concluded in Malcolm C. & Helena M. Huston, 80 IBLA 53, 57 (1984), that a one-lane dirt road passing through the applied-for tract providing access to adjacent lands could not be considered a valuable improvement.

Appellant's assertion that the two "access roads" are valuable improvements is unavailing. There has been no showing that they enhance the value of the land for any purpose.

[3] We now turn to appellant's assertion that "[t]he act of clearing a portion of the land constitutes cultivation sufficient for the issuance of a patent" (SOR at 3). On the cultivation issue, the Land Report concluded at page 2:

The application states that the parcel was cultivated in 1971-72, 1978-79 and 1985. The field examination revealed no evidence of cultivation. There were no characteristic disturbances to the soil indicating use of plows or planting equipment. There were no remnant patches of crops. Even if cultivation had taken place in the past and all signs had been obliterated the fact that no cultivation existed at the time of the application would disqualify the applicant on the issue of cultivation. Gladys Lomax, 75 IBLA 89 (1983); Bernard R. Snyder, 70 IBLA 207 (1983); Mabel M. Farlow (On Reconsideration), 39 IBLA 15, 86 I.D. 22 (1979); Middle Rio Grande Conservancy District, 86 IBLA 41 (1985). There is no evidence that an effort was made to prepare the land for cultivation which in itself might have qualified as an improvement. Ben S. Miller, 55 I.D. 73 (1934).

In public land law, the term "cultivation" is generally understood to mean a continuing activity with necessary efforts leading to the production of crops. Benton C. Cavin, *supra* at 121; Malcolm C. & Helena M. Huston, *supra* at 58. Appellant has made no allegation regarding the production of crops on the land, and BLM found no evidence of crop production. While the "clearing of underbrush, dead trees, the trimming and thinning of trees" was considered qualifying in Ben S. Miller, 55 I.D. 73, 76 (1934), those activities were undertaken to enhance the value of the land for timber production. We are not aware of any case, however, where the "clearing of some trees" has been found to constitute cultivation. <sup>5/</sup> Absent such evidence demonstrating precisely how the "clearing of some trees" is cultivation, the cultivation requirement has not been satisfied. Gladys Lomax, *supra* at 90-91.

In addition, although appellant alleges in his application specific years in which cultivation took place, he never states what that cultivation was. BLM, in its Land Report, found no evidence of cultivation. Thus, even if some form of cultivation had taken place in the past, lack of cultivation at the time of application, as noted by BLM, is disqualifying. *E.g.*, Bernard R. Snyder, 70 IBLA 207, 209 (1983).

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<sup>5/</sup> The Land Report on page 1 describes the vegetation on the parcel as "sagebrush on the flatter areas and pinion pine on the steeper slopes" and the soil as "stony and rocky." There is no evidence of timber production. Thus, clearing some trees could not be considered "valuable improvements."

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.

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Bruce R. Harris  
Deputy Chief Administrative Judge

I concur:

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James L. Byrnes  
Chief Administrative Judge