INTERIOR BOARD OF LAND APPEALS

Mattie J. Patterson

149 IBLA 367 (July 22, 1999)

Title page added by:
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MATTIE J. PATTERSON

IBLA 97-231 Decided July 22, 1999

Appeal from a decision of the Eastern States Office, Bureau of Land Management, rejecting class 2 color-of-title application MSES 45770.

Affirmed in part; set aside and remanded in part.

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

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

Where a BLM decision properly rejecting a class 2 color-of-title application also affirms a preliminary determination that the applicant's class 1 application must be rejected because improvements were not placed on the land nor were the lands reduced to cultivation, and the record indicates that applicant's predecessors-in-interest engaged in forestry practices on the land, the decision will be vacated and the case remanded to allow the applicant to show that such practices resulted in valuable improvements on the land.

APPEARANCES: Mattie J. Patterson, pro se.

OPINION BY ADMINISTRATIVE JUDGE KELLY

Mattie J. Patterson (Appellant) has appealed from a February 6, 1997, decision of the Eastern States Office, Bureau of Land Management (BLM), denying her application MSES 45770, under the Color-of-Title Act of December 22, 1928, as amended, (67 Stat. 227, 43 U.S.C. §§ 1068, 1068a, 1068b) for approximately 40 acres of land described as the SE¼NE¼, sec. 21, T. 6 N., R. 12 E., Choctaw Meridian, Newton County, Mississippi. The decision rejected Patterson's class 2 color-of-title application because she

had not documented payment of State and local taxes on the subject land for the period January 1, 1901, to the date of application, pursuant to 43 C.F.R. § 2540.0-5(b). The decision noted that the applicant could only document payment of taxes for a 9-year period, and did not submit evidence showing complete chain of title beyond 1970.

On October 22, 1992, Patterson filed a class 1 color-of-title application in her capacity as executrix of the estate of her father, Wavol Barnett. The application identified Patterson as record titleholder of the subject lands by inheritance and asserted ownership by deed, although no deed or other instrument establishing ownership was attached to the application. Appellant's listing of conveyances affecting color or claim of title identifies the date of original entry as January 24, 1860, and she also applies for the mineral estate. The application identifies no valuable structural or cultural improvements to the property, and it recites that Appellant learned from BLM that she lacked clear title to the land on January 10, 1992.

By letter dated November 25, 1992, the Assistant District Manager, Division of Lands and Renewable Resources, Jackson, Mississippi District Office, BLM, acknowledged receipt of Patterson's color-of-title application and filing fee, requested a copy of the deed by which Appellant claimed ownership of the subject land, and advised Appellant as follows:

> An initial review of your application shows that you will not qualify under Color-of-Title, class 1. Under class 1 improvements or cultivation must have been placed on the land. This has not been done. However, class 2 is still an option. Under class 2, the chain of title must be traced back to January [1], 1901. Additionally, a record of tax payments going back to January [1], 1901 must be submitted. Enclosed are copies of the Color-of-Title Tax Levy and Payment Record (Form 2540-3) to be submitted.

(Letter of Nov. 25, 1992, at 1.)

The record shows that, despite notice from BLM that the subject lands were vested in the United States, they were sold by Newton County in September 1991, after the Barnett estate failed to pay taxes for the previous 3 years. BLM then closed the case. By letter dated September 9, 1993, the Assistant District Manager, Jackson District, advised Appellant of the status of her color-of-title application:

> We have been advised by the Solicitor [of the Department of the Interior] to proceed as though the county never sold the land for taxes.
>
> We intend to continue working with you to obtain clear title to the land under the color-of-title process. Should you not qualify for a patent to the land, we will review our options

> to determine if the Bureau of Land Management will keep the land or offer it for sale. Should we offer it for sale, we will contact you and [the purchaser at the tax sale] regarding the process and provide both of you with the opportunity to purchase the land and obtain clear title.

(Letter of Sept. 9, 1993, at 1.)

In his September 9, 1993, letter to Patterson, the Assistant District Manager requested that she update and clarify information in the application filed on her behalf by her attorney on October 22, 1992, and supply additional information necessary for undertaking a class 2 color-of-title review. Specifically, the Assistant Manager requested that Appellant complete the form entitled "Conveyances affecting color or claim of title," to include conveyances from 1970 until 1992, the date she filed her application.

On January 31, 1995, Patterson's attorney filed Form 2540-3, entitled "Color-of-Title Tax Levy and Payment Record," showing taxes levied and paid from 1984 to 1993, along with the following notation:

> NOTE- The tax records are available only in the Newton County, Mississippi Courthouse through the year 1984, as they are only kept for ten years. I have been told that some of the tax records are in storage but could not determine where they were. The Tax Sale Book shows that no tax sales were made prior to 1984 so therefore I assume that all taxes have been paid.

(Form 2450-3, filed Jan. 31, 1995, at 1.)

On February 5, 1995, Patterson filed Form 2540-2, entitled "Conveyances Affecting Color or Claim of Title," noting on the form that "around 1910 Court House burned * * * Record[s] destroyed between [1910] and 1918." Appellant's Form 2540-2 notes that Wavol and Irene Barnett conveyed a right-of-way easement to the Mississippi State Highway Department on October 14, 1959, and that Wavol Barnett's agent conveyed rights in timber on the land in October 1967. The last conveyance listed on the form is from Wavol Barnett to executrix Mattie Patterson on December 6, 1979, with the notation "received at time of death." Subsequently, by letter dated February 17, 1995, BLM informed Patterson that it was processing her application and would undertake an environmental assessment and an appraisal to determine the market value of the land.

BLM conducted an appraisal of the property on April 10, 1996, and noted that the subject tract is "vacant land with no structural improvements." (Appraisal at 5.) The appraisal further notes that "the value of this 40 acre subject tract lies in the * * * 29 acres [remaining after selling 11 acres to the State of Mississippi for road construction]." (Appraisal at 4.) The appraisal concludes that the highest and best use

of the land is residential; it values the 29 acres of land at $400 per acre (rounded to $11,500) and the existing timber on the land at $62,287.50, for a total rounded value of $73,800. (Appraisal at 10.)

As part of its proposal to award the subject lands to Patterson by patent under class 2 of the Color-of-Title Act, BLM conducted an Environmental Assessment (EA No. ES-020-95-34) (EA) of the subject lands, which resulted in a Finding of No Significant Impact and a Record of Decision signed June 27, 1996.

In a section identified as "General Description AFFECTED ENVIRONMENT," the EA notes: "Remnants of terraces surrounding the plateau are evidence of an attempt to farm the tract sometime in the early 1900's. The tract was disturbed approximately 60 years ago by the cutting of timber. The faint trace of logging and skid roads is still visible on the tract." (EA at 5.)

In a discussion of cultural resources on the subject tract, the EA continues:

> Farming was evidently attempted on the tract. Remnants of terraces surrounding the ridges are evidence of an attempt to farm the tract. However, the soils are not conducive to successful farming. The area is best suited to the growing of trees, in particular, pine. (Pinus spp.)
>
> The tract was surveyed. The survey resulted in the discovery of the Gentry Road site, a 20th century farmstead (Pace and Keel 1995). This site is dated post-1900. * * *
>
> In addition to being farmed, the land has been disturbed by the cutting of timber. The faint trace of a possible logging road remains. Another road has been constructed along the top of the ridge on the eastern part of the tract.

(EA at 8.)

In her statement of reasons for appeal, Appellant disputes BLM's assertion that the chain of title submitted with her application stopped at 1970. She asserts that she filed, with the Jackson District Office, a correction to the chain of title submitted by her attorney that brings the ownership conveyances up-to-date. Additionally, Appellant challenges BLM's assertion that her application fails to demonstrate the payment of taxes to State and local jurisdictions from January 1, 1901, to the date of her application. She asserts that her counsel completed the required Color-of-Title Tax Levy and Payment Record, Form 2540-3, and filed it with the Jackson District Office, noting that tax records were not available for two time periods when the Newton County Court House burned and records were destroyed.

[1] 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: * * * And provided further, That no patent shall issue under the provisions of this chapter for any tract to which there is a conflicting claim adverse to that of the applicant, unless and until such claim shall have been finally adjudicated in favor of such applicant.

Color of title claims are described by the regulation at 43 C.F.R. § 2540.0-5(b) as follows:

> The claims recognized by the Act will be referred to in this part as claims of class 1, and claims of class 2. A claim of class 1 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 more than 20 years, on which valuable improvements have been placed, or on which some part of the land has been reduced to cultivation. A claim of class 2 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 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.

BLM correctly determined that Appellant had no valid class 2 claim, since she failed to show payment of taxes from 1901 through 1982. Appellant's assertion that Newton County Courthouse records were destroyed by fire in the early part of the 20th century clearly put her at a disadvantage in establishing a class 2 claim. Additionally, Appellant's counsel's assertions that the absence of a listing of the subject tract in tax sale records supports the conclusion that taxes were paid cannot be accorded weight as reliable evidence. The requirement to demonstrate payment is a statutory requirement and may not be waived. See Agee S. Broughton, Jr., Trustee, 95 IBLA 343 (1987); Soterra, Inc., 95 IBLA 352, 355 (1987); Weyerhaeuser Co., 89 IBLA 279, 280 (1989), and cases cited.

[2] In its decision, BLM also referenced its November 25, 1992, letter, essentially affirming its preliminary determination that Appellant's class 1 color-of-title application must be rejected on the basis that there was no evidence of improvements or cultivation on the land. However, the EA prepared by BLM in 1996 in furtherance of its proposal to patent the subject land to Appellant, pursuant to her class 2 application, reflects that Appellant and her predecessors in interest held the land in good faith and peaceful adverse possession for more than 20 years and that a ridge road, logging and skid roads, a farm homestead, and terraces to enhance cultivation had been placed upon the land. (EA at 5, 8.) Moreover, the record also shows that timber harvesting occurred on the tract "approximately 60 years ago" and that Appellant's father, from whom she inherited the property, sold timber from the tract in October 1967. (EA at 5; Appellant's Form 2540-2, "Conveyances Affecting Color or Claim of Title," filed Feb. 5, 1995.) Also, the EA asserts that soils in the subject tract are best suited for silviculture, or the growing of trees. (EA at 8.)

It is well-settled that the cultivation requirement of a class 1 color-of-title claim is not satisfied if the land is not reduced to cultivation at the time the application is filed, and that improvements relied upon to establish a class 1 color-of-title claim must be present on the land at the time the application is filed and must enhance the value of the land. Gladys Lomax, 75 IBLA 89 (1983); Bernard M. Snyder, 70 IBLA 207 (1983). Moreover, proving a valid color of title claim is the appellant's obligation, and failure to carry the burden of proof is fatal to the application. Kim C. Evans, 82 IBLA 319, 323 (1984).

In Benton C. Cavin, 83 IBLA 107, 121 (1984), we observed "that past actions of a color-of-title applicant relating to silviculture 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 Soterra, Inc., supra,, BLM issued a decision rejecting a class 2 color-of-title application, and also noted in the decision 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 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 BLM's decision to reject appellant's application as a class 1 claim, and allowed appellant to file a class 1 color-of-title application detailing its forestry practices in support of a claim that valuable improvements had been placed on the subject tract. Soterra, Inc., supra at 356.

We conclude that our decision in Soterra is applicable here. Therefore, we affirm BLM's February 6, 1997, decision as to the rejection of

Appellant's class 2 color-of-title application, and set aside and remand the decision as to the rejection of Appellant's class 1 application. On remand, Appellant shall be allowed to submit additional evidence detailing forest practices on the land to establish that valuable improvements were placed thereon.

Accordingly, 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 and set aside and remanded in part.

John H. Kelly
Administrative Judge

I concur:

T. Britt Price
Administrative Judge