BENTON C. CAVIN

IBLA 78-551 Decided June 28, 1979

Appeal from decision of California State Office, Bureau of Land Management, rejecting color-of-title application. CA 3542.

Set aside and remanded.

1. Color or Claim of Title: Generally -- Color or Claim of Title: Description of Land

   Where title to public land is claimed pursuant to the provisions of the Color of Title Act, 43 U.S.C. § 1068 (1976), instruments of conveyance used to establish chain of title need only provide in some legally recognized manner for conveyance of the land such that the claimant is invested with color of title. A residuary clause in a judicial decree distributing property of an estate is sufficient to constitute chain of title.

2. Color or Claim of Title: Generally

   The provisions of the Color of Title Act, 43 U.S.C. § 1068 (1976), apply only where a tract of "public land" is held in peaceful adverse possession and the other statutory requirements are satisfied. Where a homestead entry of record, valid on its face, has been made on public land and accepted by the proper land authorities, an equitable interest in favor of the entrant will be deemed to arise but the land will not be divested of its status as "public land."

APPEARANCES: Benton C. Cavin, pro se.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

Benton C. Cavin has appealed from a decision of the California State Office, Bureau of Land Management (BLM), dated June 22, 1978, rejecting his color-of-title application filed February 17, 1976, for land situated in the NE 1/4 NE 1/4, sec. 10, T. 6 S., R. 22 E., Mount Diablo meridian, Madera County, California.

This case is before us for the second time. Appellant's application was originally rejected by BLM on April 27, 1976, on the basis that the entire township was withdrawn on February 14, 1893, as part of the Sierra National Forest, whereas evidence of the chain of title began with a deed dated October 5, 1899. Where a color-of-title claim has been initiated while the land is withdrawn for Federal purposes, it is held not to satisfy the peaceful adverse possession requirement of the Color of Title Act, 43 U.S.C. § 1068 (1976); 43 CFR 2540.0-5(b). See, e.g., Frank W. Sharp, 35 IBLA 257 (1978); Margaret C. More, 5 IBLA 252 (1972).

In Benton C. Cavin, 31 IBLA 145 (1977), we held that the land was excepted from the force of the withdrawal pursuant to its provisions. 1/ We based this conclusion on the fact that the land office had permitted a homestead entry on the land by John McComb on April 17, 1894, over 1 year after the date of the withdrawal. As we stated therein: "The entry could only have been allowed if the land had not been withdrawn. Further, when the entry was cancelled on June 3, 1903, it was for failure to prove up timely and not because the entry had been inadvertently allowed." Id. at 148. Thus, we concluded the land was not withdrawn "until 1903 at the earliest." Id. at 148.

The case was remanded to BLM to reexamine appellant's color-of-title claim on its merits. BLM again rejected appellant's application. In its decision, BLM held that appellant's chain of title had been broken in 1942 with the conveyance from Arthur Hill to his wife Louise Grout Hill, and thus, appellant's color-of-title was initiated

1/ Proclamation No. 43 setting aside the Sierra National Forest provides: "Excepting from the force and effect of this proclamation all lands which may have been, prior to the date hereof, embraced in any legal entry or covered by any lawful filing duly of record in the proper United States Land Office, or upon which any valid settlement has been made pursuant to law, and the statutory period within which to make entry or filing of record has not expired; and all mining claims duly located and held according to the laws of the United States and the rules and regulations not in conflict therewith:

"Provided that this exception shall not continue to apply to any particular tract of land unless the entryman, settler or claimant continues to comply with the law under which the entry, filing, settlement or location was made."

with the deed from Louise Grout Hill to Carl T. Cavin on October 3, 1942, clearly after the 1893 withdrawal. The break, BLM contended, occurred because the instrument of conveyance from Arthur Hill to Louise Grout Hill, which appellant relied upon to establish his chain of title, failed to "list" the subject land. Therefore, title "did not vest" in Louise Grout Hill.

BLM clearly misconstrued the requirements for establishing chain of title in color-of-title cases. Color-of-title is initiated with conveyance of the land by an instrument which, on its face, purports to convey the land in question. Joe Stewart, 33 IBLA 225 (1977), and cases cited therein. The chain of title leading to the claimant must similarly consist of instruments which, on their face, purport to convey the land in question. There is no requirement that they "vest" title in the claimant's predecessors in interest for if they did so the claimant would not need to avail himself of the provisions of the Color of Title Act, supra. The statute contemplates the acquisition of title by those who, without title, in good faith hold public land in peaceful adverse possession for the statutory period, and satisfy the other requirements of the Act.

The land must be described with a certain degree of specificity in each instrument in the chain of title, but it is essential to distinguish between initiation of color-of-title and the chain of title itself. We note that the conveyance from Arthur Hill to his wife in the form of an amended decree of distribution as to the estate of Arthur Hill, while it did not list the subject land, provided in a residuary clause that "any other property in the State of California, not now known or discovered, which may belong to the said estate, or which said estate may have any interest in, be and the same is hereby distributed to Louise Grout Hill."

An instrument relied upon as initiating color-of-title clearly must contain "a legally sufficient description." Elsie V. Farington, 9 IBLA 191 (1973). A description will be deemed insufficient if it "does not identify the land with the degree of certainty essential to ascertain the boundaries and identity of the land." Id. at 194-5.

In Elsie V. Farington, supra, we held the description therein to be insufficient, stating:

> The deed from Elizabeth Reid to Elsie Farington merely includes a general description of "All that real property situated in the County of Sierra, State of California, bounded and described as follows: Lot East of Mount Pleasant together with the tenements, hereditaments and appurtenances thereunto belonging or in anywise pertaining." * * * From the description there is no way one could determine the extent of what was conveyed, or where it is located on the ground.

Id. at 195. Similarly, a will devising "all my estate both real and personal" would not be sufficient. Bryan N. Johnson, 15 IBLA 19, 22 (1974).

Thus, if the conveyance from Arthur Hill to his wife was relied upon as initiating appellant's color-of-title it clearly would be insufficient. On the other hand, a description of the land in an instrument relied upon as establishing chain of title need not be that specific.

[1] The first instrument in a color-of-title claimant's chain of title lays the foundation for his claim. It identifies that part of the public land which was the subject of adverse possession. Once it is established what part of the public land is claimed under color-of-title, subsequent instruments in a claimant's chain of title need only provide in some legally recognized manner for conveyance of the land such that the claimant is invested with color-of-title.

In Ivie G. Berry, 25 IBLA 213, 214 (1976), we held that a quit-claim deed conveying "All of my real property in Socorn County, New Mexico, which I now own of record", was sufficient to establish a chain of title where the claimant's predecessor in interest actually had an interest of record in the subject tract.

In the present case, Arthur Hill had an interest of record in the subject land which could be conveyed to his wife. See Appellant's Conveyances Affecting Color or Claim of Title, Form 2540-2 (December 1971) attached to his color-of-title application.

Furthermore, residuary clauses, even though general in terms, are a recognized way of conveying property. See Given v. Hilton, 95 U.S. 591 (1877); In Re Painter's Estate, 150 Cal. 498, 89 P. 98 (1907); In Re Plumer's Estate, 159 Cal. App. 2d 389, 324 P.2d 346 (1958); 80 AM. JUR. 2d, Wills § 1539 (1975).

Thus, Louise Grout Hill was invested with color-of-title and the chain of title was not broken.

In addition to contesting appellant's chain of title, BLM resurrected in its June 22, 1978, decision the argument that the withdrawal of the land as part of the Sierra National Forest took effect on February 14, 1893, there being no entry or settlement which satisfied the exceptions. BLM contends that the allowance of John McComb's homestead entry was "in error" and speculates that it may have been due to a delay in posting the withdrawal notice to the land office records or an assumption on the part of the register that the withdrawal was not applicable to the subject land, it having been "isolated by privately owned lands."

BLM fails to account for the rather telling fact, as we mentioned in our prior decision, that the homestead entry was finally cancelled

not because it had inadvertently been allowed but for failure of proof. This suggests that the effect of the withdrawal had been stayed, whether by John McComb or by someone else whose identity we need not decide. In any case, we have dealt with this matter before and our decision in Benton C. Cavin, supra, must stand.

[2] In the alternative, BLM contends that if the McComb homestead entry was valid this "would have removed the land from public land status" and the deed from Madera Flume and Trading Company (Madera), dated October 5, 1899, which appellant relies on as initiating his color-of-title claim, could not form the basis for such a claim.

The provisions of the Color of Title Act, supra, apply only where a "tract of public land" is held in adverse possession. The question for decision therefore is whether McComb's homestead entry removed the subject land from the status of "public land." We hold that it did not.

Where an entry of record, valid on its face, has been made and accepted by the proper land authorities, it will be deemed to create an "equitable interest" in the land which "must prevail not only against individuals, but against the government." Sturr v. Beck, 133 U.S. 541, 548 (1890), quoting Attorney General's Opinion, 1 L.D. 30, 31 (1881). So long as it remains a subsisting entry of record, it will segregate the land from the public domain and preclude subsequent entry under the land laws. See Shepley v. Cowan, 91 U.S. 330 (1874); Tarpey v. Madsen, 178 U.S. 215 (1900). This "equitable interest" will ripen into "equitable title" upon the making of final proof and issuance of a "certificate of entry." Witherspoon v. Duncan, 71 U.S. 210 (1866), cited in Sturr v. Beck, supra at 548; Irwin v. Wright, 258 U.S. 219 (1922). At such time, the land can no longer be said to be "public land." Witherspoon v. Duncan, supra at 218. Legal title passes with the issuance of a patent.

The factual situation presented in this appeal is similar to that which arose in Harry H. Scott, A-15425 (April 10, 1933). In that case the color-of-title originated in 1899 for land which had been thought to be included in a patented homestead entry, but which was not. In actual fact, the land had already been patented to the Oregon and California Railroad Company in 1895. Title to the land, however, was revested in the United States by the Act of June 9, 1916, 39 Stat. 218. In granting the color-of-title application, the Assistant Secretary noted:

> [W]e are authorized to sell only public land, but if the land be public at this time it is immaterial to the purpose of the act that the land may have been claimed or held in private ownership during a portion of the required 20-year period of possession. Furthermore, while this land may be regarded in a technical sense as

> having been in private ownership under the patent to the railroad company, nevertheless the Government had such interest in it as to justify resumption of the legal title in order to enforce the purpose of the original grant.

So it is with a homestead entry. While the allowance of a homestead entry segregates the lands from other entries, it does not withdraw or reserve the lands for public purposes. See generally, Asa V. Perkes, 9 IBLA 363, 80 I.D. 209 (1973). While the withdrawal would attach to the land upon the cancellation of the allowed entry, i.e., June 2, 1903, the color-of-title originated in 1899, during which time the land was not subject to the withdrawal for the Sierra National Forest. See Benton C. Cavin, supra at 148.

In the present case, acceptance of McComb's homestead entry application precluded the Government from otherwise dealing with the land but it did not remove its status as "public land." By virtue of the homestead entry, possession of the land by Arthur Hill, the grantee in the October 5, 1899, deed, was adverse to both the Government, which retained equitable and legal title, and the homestead entrant, who held an equitable interest. The provisions of the Color of Title Act, supra, remained applicable and the Madera deed formed the basis for appellant's color-of-title claim.

Appellant has requested that he be issued a patent to the land contending that his application has been pending for "in excess of 2 1/2 years" and that BLM has had "ample opportunity" to review his case. Issuance of a patent must await further administrative processing by BLM. If appellant is deemed to have satisfied all the requirements for color-of-title, patent shall issue.

Accordingly, 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 set aside and remanded for further action not inconsistent with this decision.

James L. Burski
Administrative Judge

I concur:

Anne Poindexter Lewis
Administrative Judge

ADMINISTRATIVE JUDGE THOMPSON DISSENTING:

I disagree with that portion of Judge Burski's opinion which concludes that the land was excepted from the withdrawal at the time the chain for the color-of-title initiated. The land was withdrawn on February 14, 1893. Appellant has not shown that his chain of title began until after that date, namely, with a deed dated October 5, 1899. The excepting language in the withdrawal order, Proclamation No. 43, states:

> Excepting from the force and effect of this proclamation all lands which may have been, prior to the date hereof, embraced in any legal entry or covered by any lawful filing duly of record in the proper United States Land Office, or upon which any valid settlement has been made pursuant to law, and the statutory period within which to make entry or filing of record has not expired: and all mining claims duly located and held according to the laws of the United States and the rules and regulations not in conflict therewith:
>
> Provided that this exception shall not continue to apply to any particular tract of land unless the entryman, settler or claimant continues to comply with the law under which the entry, filing, settlement or location was made.

Appellant showed that there was a homestead entry by a John McComb on April 17, 1894. In ruling on this, when the case was considered by this Board before, Judge Ritvo stated at 31 IBLA 148:

> We agree with the appellant that the land in question may have been covered by an exception to the withdrawal. While the records do not show that there was an entry or valid settlement on the land prior to the date of the withdrawal, they do show that the land office allowed McComb's homestead entry over a year after the date of the first withdrawal. The entry could only have been allowed if the land had not been withdrawn. Further, when the entry was cancelled on June 3, 1903, it was for failure to prove up timely, and not because the entry had been inadvertently allowed. One possible explanation is the land may have been settled upon prior to the allowance of the homestead entry. Whatever the reason we must conclude that the land was not withdrawn until 1903 at the earliest so that in 1899, when Cavin's color of title claim originates, the land was not withdrawn. When color of title to the land has originated before the land was under reservation, the land remains open to the initiation of a color of title claim even though it may have been within the outer boundaries of the withdrawal. Asa V. Perkes,

9 IBLA 363, 80 I.D. 209 (1973); Myles Stephanson, 16 IBLA 252 (1974); Clement Vincent Tillion, Jr., A-29277 (April 12, 1963).

> Accordingly, we conclude it was improper to reject Cavin's color of title claim on the ground that the land it covers was withdrawn before his claim originated. It must be reexamined on its merits. Since the land is within the boundaries of a national forest the proper office of the Forest Service should be notified of the application. See 43 CFR 1862.4. [Emphasis added.]

In dissenting from that opinion, I pointed out that Judge Ritvo's conclusion rested upon an inference which was not based upon facts in the record and that an opposite inference could be drawn from the facts shown, i.e., that the entry was erroneously allowed. I suggested that, at most, a fact-finding hearing might be appropriate to afford the appellant the opportunity to establish the initiation of his color-of-title claim prior to the withdrawal, the date the withdrawal attached to the land, if it did, and other evidence going to the validity of his claim.

In reconsidering the case, the BLM California State Office reexamined the official Federal status records for the land. In the decision of June 22, 1978, it was pointed out that neither the Washington, D.C., nor the California State Office tract books or other records bear any notation that affected the NE 1/4 NE 1/4 of section 10 prior to the forest withdrawal on February 14, 1893. Indeed, they point out that the United States began reacquiring the patented lands in section 10, beginning with the SE 1/4 NE 1/4, which was deeded to the United States on February 18, 1900. By February 7, 1901, the United States had acquired deeds to all the patented lands in section 10, with the exception of the W 1/2 NE 1/4 and S 1/2 NW 1/4, which remain in private ownership. With specific references to the homestead entry, Stockton 6220, for the NE 1/4 NE 1/4 on April 17, 1894, to John McComb, the decision states that the documents on file in the entry case file do not show that McComb was "entitled to any relief or special consideration by virtue of having occupied or settled the land, or having had any interest whatsoever in the land prior to the February 14, 1893, Forest Withdrawal." It concludes that allowance of the entry was in error and was void.

If, as BLM has indicated, the McComb homestead entry does not reflect settlement on the land by the entryman before the withdrawal attached to the land, allowance of the entry when the land was withdrawn was obviously erroneous. It is incongruous, in the face of this information, to rule, as the majority does, that the withdrawal was not effective as to the NE 1/4 NE 1/4 of section 10 when it was made in 1893. The effect of the majority's decision is that appellant's chain of title initiated in 1899 may be accepted even though a homestead entry was probably erroneously allowed a year after the withdrawal and 5 years before the first deed in appellant's chain of

title. The inference upon which Judge Ritvo's opinion was based that the homestead entry was properly allowed because of a prior settlement, can no longer be drawn in the face of the additional information shown by the BLM decision. His conclusion was only one of conjecture "that the land may have been covered by an exception to the withdrawal." Since there is no longer a basis for that conjecture, the Board's prior decision should be set aside and the matter reexamined.

Joan B. Thompson
Administrative Judge

41 IBLA 276