Editor's note: 95 I.D. 64; Appealed -- aff'd, sub nom. Foust v. Hodel, Civ.No. 88-235-K (D.Wyo. Nov. 13, 1989), rev'd, No. 90-8004 (10th Cir. Aug. 14, 1991), 942 F.2d 712; petition for cert sub nom. Northern Arapaho and Shoshone Indian Tribes of the Wind River Indian Reservation v. Foust, S.Ct. No. 91-1209 (Jan. 22, 1992); cert denied April 20, 1992, 112 S.Ct. 1668

SHOSHONE AND ARAPAHOE TRIBES

IBLA 86-329 Decided May 23, 1988

Appeal from a decision of the Wyoming State Office, Bureau of Land Management, approving application for patent corrections. C-050733 and C-051835.

Reversed.

1. Federal Land Policy and Management Act of 1976: Correction of Conveyance Documents--Patents of Public Lands: Corrections

   Under sec. 316 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. | 1746 (1982), the Secretary has authority to correct errors in patent documents at any time correction is deemed necessary or appropriate. However, in correcting errors under this statutory authority, only mistakes of fact may be corrected, not mistakes of law.

2. Federal Land Policy and Management Act of 1976: Correction of Conveyance Documents--Patents of Public Lands: Corrections

   Before action may be taken to correct a patent pursuant to 43 U.S.C. | 1746 (1982), the applicant for correction must show that an error in fact was made. Once the existence of an error in fact is shown, consideration may be given to matters of equity and justice which warrant amendment of the patent.

3. Homesteads (Ordinary): Lands Subject to--Homesteads (Ordinary): Settlement--Powersite Lands

Lands withdrawn for powersite purposes do not become available for homestead entry until an order of restoration is issued. No rights may be acquired by
a settler on public land who initiates settlement at a time when the records of the Department indicate that the land is not open to entry.

4. Federal Land Policy and Management Act of 1976: Correction of Conveyance Documents--Patents of Public Lands: Corrections

Absent exceptional circumstances, the Department cannot amend a patent to include lands that were not subject to entry by the original entryman.

APPEARANCES: Robert S. Thompson III, Esq., Boulder, Colorado, for the Northern Arapahoe Tribe and W. Richard West, Jr., Esq., Washington, D.C., for the Shoshone Indian Tribe; William L. Miller, Esq., and John R. Hursh, Esq., Riverton, Wyoming, for Oliver J. Foust.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

The Shoshone and Arapahoe Tribes of the Wind River Indian Reservation (Tribes) appeal from a decision of the Wyoming State Office, Bureau of Land Management (BLM), dated December 30, 1985, approving an application for correction of conveyance documents by Oliver J. and Marjorie E. Foust 1/ pursuant to section 316 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. | 1746 (1982). In its decision, BLM found that
the two patents held by Oliver Foust (Foust) (Patent No. 1087000 and Patent

1/ Marjorie Foust died Dec. 27, 1984.

No. 1087176) erroneously described the lands that his predecessor-in-interest, Byron H. Smith, entered and improved.

Foust is the record title owner of lots 4 and 5 and the NE^ SE^ of sec. 28, T. 6 N., R. 6 E., Wind River Meridian. The lands are located within the Wind River Indian Reservation, Hot Springs County, Wyoming. Foust acquired these lands on June 19, 1963, by warranty deed from Evangeline Smith Meeks, widow of the original patentee, Byron H. Smith.

In 1968 or 1969, the Bureau of Indian Affairs (BIA) discovered that Foust's home and other improvements were in trespass on tribal lands and requested an official survey by BLM. Pursuant to Special Instructions dated August 6, 1975, and Supplemental Special Instructions dated June 14, 1979, BLM conducted a dependent resurvey and survey of sec. 28, T. 6 N., R. 6 E., Wind River Meridian, in October and November 1979. The plat of that resurvey and survey was approved by BLM on January 29, 1980. In accordance with

the special survey instructions, the S\ NE^ of sec. 28 was subdivided into lots 9, 10, 11, and 12. The boundaries of lot 11 were established by BLM to include all Foust's improvements. The resurvey confirmed that Foust's home and other improvements were located within the S\ NE^ of sec. 28, in trespass on tribal lands, and not located on lands conveyed to Foust by Smith's widow.

In order to resolve the trespass situation, Foust proposed to exchange the NE^ SE^ of sec. 28 (40 acres) for lot 11 of sec. 28 (9.74 acres),

but this offer was rejected by the Tribes. Next, the Fousts offered to

exchange lot 5 of sec. 28 (47.55 acres) for lots 9, 11, and 12 of sec. 28 (40.02 acres). The Tribes rejected this offer also.

By letter dated March 15, 1982, the Department of the Interior Field Solicitor, Billings, Montana, informed the Fousts that accrued damages resulting from unauthorized occupancy from June 16, 1963, to February 15, 1980, totaled $25,000, plus an undetermined rental for 1981 and 1982. The Field Solicitor set forth the following settlement proposals:

> 1. Payment for past rentals up to and including 1981 and 1982.
>
> 2. Execution of an easement to the Tribes to cross fee lands in lot 4, sec. 28, T. 6 N., R. 6 E., [2/] to obtain access to other Tribal trust lands.
>
> 3. Possibly entering into a lease by the Tribes to the lands involved in the alleged unauthorized use.

The Fousts found these proposals to be unacceptable and filed an application for correction of conveyance documents pursuant to section 316 of FLPMA, 43 U.S.C. | 1746 (1982), on May 3, 1982. This application explained that it was only after the resurvey was approved on January 29, 1980, that the Fousts learned that their present home with all of its outbuildings was not located on lot 5 as they had previously thought, but was on what is now described as lot 11, located principally in the SW^ NE^ sec. 28. The Fousts concluded from this circumstance that a "misdescription of the original homestead appeared on the face of the patent."

2/ Lot 4 was sold by the Fousts at sometime prior to their application for patent correction (Land Report at 6).

The Fousts argued that the best evidence of error in the patent is the layout of the land. They explained that their improvements are located in a small canyon arising out of the Wind River, almost perpendicular to Wind River Canyon. They said that for approximately 1 mile north or south of their home, there are no suitable locations for a homestead site because of extremely rough terrain and cliffs, especially in lot 5. They pointed out that the only site upon which a home and improvements could have been reasonably constructed is the present lot 11. The Fousts contended that the error was made because, until 1980, no reliable survey had been made of the area.

In order to correct the perceived error, the Fousts proposed to deed back to the United States lot 5, sec. 28 in exchange for the present lots 9, 10, and 11, sec. 28, 3/ which contain almost identical acreage. The Fousts specified that a new patent should be issued to them conveying lots 9, 11, and 12, sec. 28.

In the decision approving the Fousts' application for correction of conveyance documents, BLM found that both of the patents issued to Smith erroneously describe the lands that Smith entered and improved. BLM found that Smith actually entered the SE^ NE^ instead of NE^ SE^ of sec. 28 in entry C-050733 and the SW^ NE^ instead of lot 5 of sec. 28 in entry C-051835. BLM determined that relief was warranted and stated that the patents may be corrected, inter alia, by conveyance of the S\ NE^, containing the lands upon which Smith built, to the Fousts in exchange for the

3/ This proposal should have read lots 9, 11, and 12, rather than 9, 10, 11.

land patented to Smith in lot 5 and the NE^ SE^ sec. 28, which would be reconveyed to the United States. Attached to this decision was BLM's land report recommending approval of the Fousts' application, upon which report BLM presumably relied in making its determination.

The history of the ownership status of sec. 28 is relevant to consideration of this appeal. On July 3, 1868, the Wind River Indian Reservation was established by treaty concluded between the United States and the Eastern Band of the Shoshone Tribe on lands including sec. 28. The lands in sec. 28 were included in those ceded to the United States pursuant to the Act of March 3, 1905, 33 Stat. 1016. The 1905 Act permitted homesteading on those lands for 5 years after the President declared the reservation open for homesteading. After the 5-year period, sales were to be made only by competitive bidding. 33 Stat. 1020-1022. The President declared the reservation open for homesteading by Presidential Proclamation of June 2, 1906. Thereafter, rather than having competitive bidding for the remaining land, the Secretary, by letter to the Commissioner of the General Land Office, dated May 27, 1915, postponed the sale indefinitely. However, BLM, in its land report dated December 23, 1985, notes that at the time of the 1905 Act, the lands in sec. 28 were unsurveyed and therefore not subject to entry under the homestead laws.

On February 10, 1910, the lands in sec. 28 were withdrawn for Temporary Power Site Withdrawal No. 115 by Executive Order (E.O.). On July 2, 1910, Power Site Reserve No. 115 was established by E.O., pursuant to the Act of June 25, 1910, 36 Stat. 847. The E.O. of July 2, 1910, ratified, confirmed, and continued the withdrawal created by the E.O. of Feb. 10, 1910, and

included all of sec. 28 (unsurveyed). The survey plat for a portion of T. 6 N., R. 6 E., including sec. 28, was approved on November 12, 1927, and, by Secretarial Order (SO) dated May 10, 1928, Power Site Interpreta-tion No. 115 was conformed to the powersite withdrawal. Withdrawn lands in sec. 28 included lots 1 through 8, SW^ NE^, W\ NW^ and NW^ SW^. On October 5, 1928, the Official Survey Plat was filed.

By notice of the General Land Office dated November 17, 1928, lands shown on the survey plat filed October 5, 1928, were opened to homestead entry pursuant to the Act of March 3, 1905, beginning December 15, 1928. This notice stated that the lands included in power site reserve 115 were not subject to appropriation except in a case of valid existing claims initiated prior to February 10, 1910. Lands not subject to appropriation included lots 1 through 8, SW^ NE^, W\ NW^, NW^ SW^ sec. 28. Thus, as of December 15, 1928, the NE^ SE^, which was subsequently patented to Smith, was opened to homestead entry. Then, on August 29, 1930, lots 4 and 5 of sec. 28, which also would be patented to Smith, were opened to entry by Restoration 541. By SO dated Aug. 28, 1942, the Secretary restored "undisposed of ceded land of the Wind River Reservation" in that portion of sec. 28 lying east of the Big Horn River to tribal ownership.

On December 9, 1929, Byron Smith filed an application for stock-raising homestead entry No. 050733 on the NE^ SE^ of sec. 28. The land office rejected Smith's application, stating that the land was not sub-ject to entry under the 1905 Act. On December 15, 1929, Smith appealed this decision. On the same day that he filed his appeal, Smith filed

Supplemental Homestead Entry C-050733 for the same land under R.S. 2289. On July 9, 1930, Homestead Entry C-050733 was allowed under R.S. 2289.

On March 19, 1930, Smith filed an application for a stock-raising homestead entry on lots 4 and 5. This application was allowed March 16, 1931.

In their statement of reasons, the Tribes contend that the lands in question are "Indian lands" not "Public lands" and are not within the purview of section 316 of FLPMA and that FLPMA does not authorize BLM to divest the Tribes of title without their consent to the lands sought by the Fousts. The Tribes assert that even if section 316 did permit the requested relief, BLM could not grant the Fousts' application unless they clearly established that Smith had made a mistake in describing the lands
he intended to enter, an occurrence which they deny took place. The Tribes point out that the Fousts' effort to make a showing of such error is contradicted by the location of the Smith settlement within a powersite withdrawal and by Smith's own description of the lands patented. The Tribes believe that Smith's "mistake" was deliberate rather than inadvertent and that no clear error of description has been shown.

In addition to requiring a showing of mistake, the Tribes point out that BLM must determine whether "considerations of equity and justice" mandate the correction and that no such determination has been made by BLM. The Tribes contend that Smith's "apparent fraud" (consisting of the fact

that he appears not to have entered the land for agricultural purposes despite his declared purpose to do so), the fact that he could not have obtained the land now sought by Foust even if he had applied for it, the fact that the 1905 Act never should have been relied upon to patent land in the 1930's, and Foust's own lack of reasonable diligence, all weigh heavily against the application.

In response, Foust states that under section 316 of FLPMA, the rationale for correcting an error in a patent is to simply correct an error that was made at the time the patent was issued. Foust asserts that the lands in question were public lands at the time the patent was issued. In addition, Foust argues that many of the arguments made by the Tribes are collateral attacks on a patent which is insulated by the passage of time from such attacks by provision of 43 U.S.C. | 1166 (1982), a circumstance which he claims renders much of the Tribes' argument irrelevant to these proceedings. Foust states that the statutory purpose of correcting patents is to grant to the present landowner the lands which in reality were originally homesteaded. The only way to accomplish this, according to Foust, is for the Secretary to correct the conveyance to show the actual land originally entered and homesteaded.

Foust contends that the issue here concerns what lands Smith was entitled to claim as a result of compliance with the homestead laws. Foust asserts that the record shows that the only land in the area suitable for homesteading was the land actually improved by Smith.

In response to the Tribes' argument that the lands were not subject to entry under the homestead laws, 4/ Foust asserts that under section 316 of FLPMA the Secretary has the authority to determine that issue and make corrections. Foust contends that an error was made and that the best evidence of mistake is the fact that the terrain is so rough in the area described by the patents that it would be impractical, if not impossible, for improvements to have been built there.

Foust believes that there are equities which favor granting the corrections sought. Foust asserts that he and his wife, now deceased, and their predecessors have lived on the land over 40 years, have constructed further improvements, maintained the land, paid the taxes, and lived in a small, level valley (described by the parties as a "draw") which is the land best suitable for a homesite in the vicinity of the patented lands. Foust claims that he had a title search made before he purchased the property and was a purchaser in good faith. Foust points out that he is elderly and that the economic hardship in losing his home would be severe. In contrast,

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4/ The Tribes state that under the 1905 Act, the ceded lands were available for homesteading for a 5-year period beginning in 1906 when the President
declared them to be open to entry. Thus, the Tribes contend that after 1911 the lands in question could not be entered for homesteading purposes. The Tribes contend that, as a consequence, the notice of the General Land Office dated Nov. 17, 1928, opening the lands to homestead entry beginning Dec. 15, 1928, was illegal. Since the lands in sec. 28 were unsurveyed at the time of the President's proclamation opening the lands in 1906, the notice of the General Land Office, issued after the official plat of survey was filed in 1928, found that the opening was proper. This notice, however, specifically stated that the lands included in powersite reserve No. 115 were not subject to appropriation except in a case of valid existing claims initiated prior to Feb. 10, 1910. The notice listed SW^ NE^ sec. 28 as land withdrawn for powersite reserve No. 115. Since there has been no allegation that Smith entered the SW^ NE^ prior to 1910, there is no basis for finding he had a valid existing claim to the withdrawn lands in sec. 28 as a result of his later entry onto those lands.

Foust contends that granting relief to him would not create any hardship on the Tribes by hindering the economic, social, or long-range development of the reservation. Foust states that BIA entered no objection or made only "tacit" objection to patent correction on appeal.

[1] Section 316 of FLPMA authorizes the Secretary of the Interior to "correct patents * * * where necessary in order to eliminate errors." 43 U.S.C. | 1746 (1982). The statute, thus, invests the Secretary with discretionary authority to correct patents which contain an erroneous description of the patented land such that the description does not match the land the patentee either originally applied for or entered or intended to enter on the ground. Arthur Warren Jones, 97 IBLA 253, 254 (1987); Rosander Mining Co., 84 IBLA 60, 63 (1984); Elmer L. Lowe, 80 IBLA 101, 105-106 (1984); George Val Snow (On Judicial Remand), 79 IBLA 261, 262 (1984). By regulation the term "error" is limited to mistakes of fact and not mistakes of law. 43 CFR 1865.0-5(b); Lone Star Steel Co., l0l IBLA 369 (1988); Bill G. Minton, 91 IBLA 108 (1986). The first obligation of an applicant for amendment of a land description in a patent, then, is to establish that the land description questioned is in fact erroneous. George Val Snow (On Judicial Remand), supra. Without a clear showing of error, the Secretary is not empowered to exercise his statutory discretion to favor or disfavor the application. Id. Once the applicant has demonstrated the existence of error in the land description, his next obligation is to show that considerations of equity and justice favor the allowance of his application. Id.

[2] Foust has not shown that there was a mistake of fact involved in the patents in question. He has not pointed to any misdescription or other circumstance to indicate the existence of factual error. On the contrary, he merely concludes, from the fact that his buildings have been shown to be in trespass, that there must have been some mistake. This is not a case, however, where the occurrence speaks for itself, as he assures.

Foust has failed to submit any evidence to show that the patents issued to Smith do not correctly describe the lands he sought in his applications for patent. In his Petition for Designation of the NE^ SE^ as stock-raising lands, filed December 9, 1929, Smith stated all the lands in the NE^ SE^ sec. 28 are "rough and broken and not susceptible of cultivation" and "of such character that they are not suitable for any other use than grazing purposes and owing to the rough and uneven surface cannot be cultivated." Again in his Petition for Designation of lots 4 and 5 as stock-raising lands dated September 17, 1930, Smith stated that the "land is all of the same general character. It is very rough and covered mostly with sage brush with some native grasses." It is apparent, therefore, that there was no mistake for these words describe the lands for which Smith applied and these are the lands included in his patents.

As the Tribes contend, there are other indications that there was no mistake made by Smith, although he located his buildings outside his patented lands. For example, Foust claims that Smith intended to build his homestead on lot 5 but actually built it on lot 11. Foust describes lot 5 as "extremely rough and steep" and "consist[s] mostly of cliffs," whereas lot 11 is the only spot in the area suitable as a homestead site

(Application for Correction at 4). This is inconsistent with Smith's statement in his final proof that his residence was on the original entry, NE^ SE^ of sec. 28, not on lot 5. Moreover, it must be observed that because the NE^ SE^ and lot 11 do not adjoin one another, it is extremely unlikely that Smith mistakenly confused the location. The only improvement listed as being on lot 5 was a garden fence. Considering the relationship of the NE^ SE^ (the lands in Smith's original entry) to the SW^ NE^ (the lands now encompassing Foust's improvements), it is difficult to imagine that Smith could have confused the boundary between these parcels. They touch only at a corner and do not share a single boundary. Furthermore, had Smith applied for the lands which he actually improved, his application would have been rejected because the lands were included in a powersite withdrawal. This circumstance negates entirely the possibility that a mistake was made in the description of the patented land. 5/

[3] The land where Smith's buildings were placed, the SW^ NE^, was withdrawn for powersite purposes in 1910 and remained withdrawn until 1942 when it was restored to Tribal ownership. It was not available for homestead entry at the time Smith made his entry. BLM erred, therefore, in finding in the land report attached to the decision under review that the S\ NE^ "was equally available for entry" with the patented lands in 1928. See Carmel J. McIntyre, 67 IBLA 317 (1982), dismissed for lack of subject

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5/ Foust refers to the Board's decision in Mantle Ranch Corp., 47 IBLA l7, 87 I.D. l43 (l980), in which the Board stated that even if the rights of the patent holder claiming a right to correction of his patent were subject to the effect of withdrawals, the Secretary could grant relief in his discretion if the agency administering the withdrawn land gave its approval. In the Mantle case, however, Mantle's entry preceded both of two described withdrawals.

jurisdiction, McIntyre v. United States, 568 F. Supp. 1 (D. Alaska 1983), aff'd, No. 85-3861 (9th Cir. May 20, 1986).

In the land report of December 23, 1985, which supplies the foundation for the decision to correct patent now under review, BLM found that Smith's entry was contingent upon a Geological Survey (GS) determination pursuant

to section 24 of the Federal Power Act of June 10, 1920, 16 U.S.C. | 818 (1982), that the value of the land for power development purposes would not be injured or destroyed by location, entry, or selection under the public land laws. BLM stated that such a determination was made as to lots 4 and 5 in response to Smith's application C-051835 and the patent contains such a restriction. The BLM land report then goes on to say that "[t]he S\ NE^ of sec. 28, which Smith actually occupied and improved, was equally available for entry when he filed applications C-050733 and C-051835" (Land Report at 6). BLM does not mention that the SW^ NE^ was specifically excluded from appropriation in the General Land Office notice of November 17, 1928, opening the lands in sec. 28 to homestead entry. There is no evidence that GS made a determination under section 24 of the Federal Power Act respecting the SW^ NE^ of sec. 28 as it did for lots 4 and 5.

Land withdrawn for powersite purposes does not become available for entry until an order of restoration is issued. No rights may be acquired by a settler on public land who initiates settlement at a time when the records of the Department indicate that the land is not open to entry. Carmel J. McIntyre, supra. The BLM finding concerning the availability to entry of the land which is now lot ll is clearly erroneous. The erroneous finding

was central to the conclusion that a correction such as was purported to be made here, was proper.

The BLM decision before us on appeal does not discuss either the factual or legal basis for the correction of the patent which is ordered by the decision, but assumes that such action is proper, in apparent reliance upon the land report. The findings of the land report, therefore, become very important to an understanding of BLM's decision because they form the legal foundation for the decision. Since the land in the SW^ NE^ was continuously closed to entry from 1910 until 1942 when it was returned to tribal ownership, anyone applying for patent to that land would have been refused a patent. It is of course correct that the lands patented to Smith had been also withdrawn for powersite purposes prior to Smith's entry. Indeed, Smith showed that he was familiar with the existence of the powersite withdrawal in sec. 28 in the appeal he filed with the Department in 1929 following the initial rejection of his homestead entry. Unlike those lands patented, however, which were subsequently opened to entry, the
SW^ NE^ was never opened. This distinction is important in this case because it indicates there was no application made for the land remaining
in the powersite withdrawal because there was no legal possibility that it could be conveyed to an entryman. When the land report blurred this distinction between the land which is now designated lot 11 and the patented lands, that error paved the way for a conclusion that the existence of a mistake was a possibility in this case. But, when this possibility is shown not to exist, the entire notion that there was a mistake is dispelled.

[4] Nor do we find that Foust is entitled to relief in this case as a matter of equity. It is apparent that Foust did not exercise due diligence in purchasing the property in question. Foust implies that until the 1980 resurvey, there was no way he could have discovered that his home and outbuildings were located on the Tribes' lands. The Tribes, however, point out that BIA discovered his trespass by using a GS map and master title plats for the Reservation. Both the 1928 homestead opening and powersite withdrawal were described by reference to the 1928 survey, which was available both to Smith and Foust. The 1928 survey shows the lots and quarter quarters of sec. 28 and the general topography of the land. The 1928 survey also shows the draw where Smith built, and it shows that the draw was not within the land patented to Smith, but that it was located instead within the powersite withdrawal in the SW^ NE^. The BIA range conservationist who detected the trespass did not need to leave his office to see that there was a trespass.

Although Foust argues otherwise, it is apparent the trespass was discovered by BIA before the resurvey in 1980, and that the survey was intended to be used to confirm positively the observed condition. The

same sources that BIA used to discover the trespass were available to Foust in 1963 when he purchased the property. The argument that the trespass was undetectible before the survey approved in l980 would be more persuasive had Foust ordered his own survey at the time of purchase or relied upon a survey furnished by his seller. As it is, such an argument merely points up the apparent neglect of a purchaser who failed to obtain a survey of lands purchased prior to sale.

Foust claims that when the land was purchased in 1963 it was taken with an abstract of title showing no liens or claims by the Tribes. Foust asserts that he contacted a surveyor and was told that exact surveys in the canyon were impossible (Response to Statement of Reasons at 7). This testimony serves to reinforce our conclusion that Foust was negligent in failing to obtain a survey since the reported response by the surveyor should have alerted him to a possible defect in the survey of the Smith lands. Nor does Foust allege that Smith engaged the services of a surveyor in preparing his applications. Indeed, Foust fails to present any evidence that Smith relied on the opinion of a professional in describing the property. Cf. Mantle Ranch Corp., 47 IBLA 17, 32, 87 I.D. 143, 151 (1980). 6/ On appeal, Foust suggests that the 1928 survey was somehow inadequate, but does not specify how it could have deceived Smith concerning the location of the Smith improvements. The 1980 resurvey does not appear to have discovered any error in the 1928 survey, and none is cited by Foust. Like the assertion that mistake can be inferred from the topography of the land surrounding the Smith improvements, this argument also lacks a support in fact.

Foust points out that in Mantle, the Board held that "[t]he heirs of Charles Mantle are entitled to what their father and husband actually earned by his compliance with the homestead law." Mantel Ranch Corp., 47 IBLA at 38, 87 I.D. at 154. In the Mantle case we found that no undue prejudice to the public interest would result from allowing the patent

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6/ In Mantle, the Board noted that the applicant had paid a surveyor to describe his land and to "make out the papers for the original homestead." The Board commented that having entrusted this task to someone he believed to be a professional, it is conceivable that Mantle assumed it had been correctly done and never undertook to analyze it himself. Mantle Ranch Corp., 47 IBLA at 32, 87 I.D. at 151.

correction because the agency charged with responsibility for the lands sought by the applicant agreed to the changes desired. In this case, however, BIA, one of the responsible agencies, has opposed the change Foust wishes to obtain, as noted infra. 7/

In the present appeal, moreover, we have the additional interest of the Tribes to consider. The Federal Government has ultimate responsibility for the Indians. Mohegan Tribe v. State of Connecticut, 528 F. Supp. 1359 (D. Conn. 1982). Supreme Court decisions require the trust obligation owed by the United States to the Indians be exercised according to the strictest fiduciary standards. See Nance v. Environmental Protection Agency, 645 F.2d 701 (9th Cir. 1981), citing United States v. Mason, 412 U.S. 391, 398 (1973); Seminole Nation v. United States, 316 U.S. 286, 296-97 (1942). In reviewing BLM's decision in this case we must be aware that any Federal Government action is subject to the United States fiduciary responsibilities toward the Indian Tribes. See Nance v. Environmental Protection Agency, supra at 711.

Here, BIA, the agency administering the SW^ NE^, is on record as having opposed the correction proposed by Foust for the reason it would be contrary to the best interest of the Tribes. The position of BIA is stated as follows:

7/ Another consideration in Mantle, supra, was the fact that there was written acceptance by BLM of a deed from appellant to the United States
and the subsequent recordation of that deed at BLM's direction, in contemplation that the patent would be amended. The Board found this had "significant implications in equity." 47 IBLA at 38, 87 I.D. at 154. No such circumstance is present in this case.

> Please be advised that the Bureau of Indian Affairs opposes the application to correct Mr. Foust's homestead patent. Based on the facts of this case, it is our opinion that a correction of the patent would be detrimental to the Shoshone and Arapahoe Tribes. Further, it is not clear that an error of the description was made.
>
> For the foregoing reasons and in fulfilling our trust responsibility to the Tribes, we support the position of the Shoshone and Arapahoe Tribes.

(Memorandum dated June 16, 1983, BIA Area Director to BLM). In effect, BIA endorses the position taken by the Tribes.

Finally, Foust's contention that 43 U.S.C. | 1166 (1982) is applicable to exclude from our consideration the issues raised by the Tribes concerning the equitable position of the Fousts vis-a-vis the Tribes is without merit. That section states: "Suits by the United States to vacate and annul any patent shall only be brought within six years after the date of the issuance of such patents." Section ll66 is inapplicable. This is not an action to annul a patent. To the contrary, upon review of an administrative determination that a patent should be amended, the Board holds otherwise. We find no foundation in fact for holding that Smith's patents were meant to convey any land other than lots 4 and 5 and the NE^ SE^ sec. 28, the land described by the patents. See Roland Oswald, 35 IBLA 79, 88-89 (1978). An application to change the legal description of a patent may not be approved where the record does not support a finding that the entryman erred in describing the lands that he entered. Ben R. Williams, 57 IBLA 8 (1981).

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 reversed.

Franklin D. Arness
Administrative Judge

We concur:

John H. Kelly
Administrative Judge

Wm. Philip Horton
Chief Administrative Judge