

LLOYD SCHADE
STATE OF ALASKA

IBLA 89-358

Decided October 4, 1990

Appeals from a decision of the Alaska State Office, Bureau of Land Management, denying an application to correct patent No. 50-83-0143 by eliminating a 200-foot wide easement for highway purposes, and reducing the width of the easement to 100 feet. AA 57751.

Affirmed in part, reversed in part.

1. Alaska: Trade and Manufacturing Sites--Federal Land Policy and Management Act of 1976: Correction of Conveyance Documents--Patents of Public Lands: Corrections--Patents of Public Lands: Reservations

Under sec. 316 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1746 (1982), the Secretary has the authority to correct factual errors in patent documents at any time correction is deemed necessary or appropriate. However, only mistakes of fact may be corrected, not mistakes of law, and where a patent holder applies to have a patent corrected to eliminate an easement, that application is properly denied if the record shows the easement was not erroneously included in the patent on the basis of a mistake of fact.

2. Alaska: Trade and Manufacturing Sites--Federal Land Policy and Management Act of 1976: Correction of Conveyance Documents--Patents of Public Lands: Corrections--Patents of Public Lands: Reservations

BLM has the authority to initiate and make corrections to a patent on its own motion, if all existing owners agree. Where the State of Alaska has an interest in the patent due to the inclusion of an easement for its benefit and, as such, is a concerned administrative agency, its objection to the reduction of the width of the easement in the patent precludes BLM from changing the patent on its own motion.

APPEARANCES: Lloyd Schade, pro se; Carolyn E. Jones, Esq., Assistant Attorney General, Anchorage, Alaska, for the State of Alaska.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

Lloyd Schade and the State of Alaska, Department of Transportation and Public Facilities (the State), each appeal from different aspects of a March 8, 1989, decision of the Alaska State Office, Bureau of Land Management (BLM). Schade appeals BLM's denial of his application to correct patent No. 50-83-0143 by eliminating a 200-foot wide easement for East End Road. The State objects to BLM's decision to reduce the width of the easement to 100 feet.

A brief outline of the history of the administration of roads in Alaska provides relevant background for this appeal. Pursuant to the Act of January 27, 1905, 33 Stat. 616, as amended by the Act of May 14, 1906, 34 Stat. 192, Congress authorized the Secretary of War to administer the roads and trails in Alaska. In 1932, Congress transferred administration over those roads and trails to the Secretary of the Interior pursuant to the Act of June 30, 1932, 47 Stat. 446.

Effective August 10, 1949, the Secretary promulgated Public Land Order (PLO) 601, 14 FR 5048 (Aug. 10, 1949), which divided all roads under his jurisdiction in Alaska into three classes: through roads, feeder roads, or local roads. In that same order, he withdrew from all forms of appropriation under the public land laws public lands within 150 feet of each side of the center line of all through roads, 100 feet of each side of the center line of all feeder roads, and 50 feet of each side of the center line of all local roads and reserved them for highway purposes.

On October 19, 1951, PLO 757 amended PLO 601 by revoking the general withdrawal for local and feeder roads (16 FR 10749, 10750 (Oct. 19, 1951)), and simultaneously, the Secretary issued Secretarial Order (SO) 2665 establishing easements for, rather than withdrawals of, 50 feet on each side of the center of each local road and 100 feet on each side of the center line of each feeder road. 16 FR 10752 (Oct. 19, 1951). Section 3(c) of SO 2665 also provided for "floating easements" which would "attach as to all new construction involving public roads in Alaska when the survey stakes have been set on the ground and notices have been posted at appropriate points along the route of the new construction specifying the type and width of the roads." Id.

The Secretary of the Interior's jurisdiction over the Alaskan road system ended in 1956 when Congress enacted section 107(b) of the Federal-Aid Highway Act of 1956, 70 Stat. 377, which transferred the administration of the Alaskan roads to the Secretary of Commerce. This change in authority was reiterated on August 27, 1958, when Congress revised, codified, and reenacted the laws relating to highways as Title 23 of the United States Code. See 23 U.S.C. § 119 (1958). The Commerce Department's Bureau of Public Roads reclassified and renumbered the Alaskan roads under its jurisdiction as primary, secondary "A," and secondary "B" routes, but did not specify the widths of those classes of roads.

Section 21(a) of the Alaska Omnibus Act, 73 Stat. 145 (1959), enacted on June 25, 1959, directed the Secretary of Commerce to convey to the State

of Alaska all lands or interests in lands "owned, held, administered by, or used by the Secretary in connection with the activities of the Bureau of Public Roads in Alaska." Section 21(d)(3) and (7) of that Act repealed 23 U.S.C. § 119 (1958), and the Act of June 30, 1932, 47 Stat. 446, effective July 1, 1959. 73 Stat. 145-46 (1959).

On June 30, 1959, pursuant to section 21(a) of the Alaska Omnibus Act, the Secretary of Commerce issued a quitclaim deed to the State of Alaska, in which he "devise[d], release[d], and quitclaim[ed] * * * all rights, title, and interest of the Department of Commerce in and to all of the real properties * * * which properties are now owned, held, administered, or used by the Department of Commerce in connection with the activities of the Bureau of Public Roads in Alaska." East End Road was listed in one of the schedules attached to and incorporated in the deed under the classification of Federal-Aid Secondary Class "A" Routes as FAS 414. The deed described the road as traveling from the junction with Federal-Aid Primary Route 21 in Homer northeasterly to Fox River, and indicated that the road system consisted of 12.5 constructed miles and an additional 12.5 proposed miles.

On September 9, 1959, pursuant to the Trade and Manufacturing Site Act of May 14, 1898, as amended, 43 U.S.C. § 687(a) (1982) (repealed by section 703(a) of the Federal Land Policy and Management Act of 1976 (FLPMA), 90 Stat. 2789 (Oct. 21, 1976), effective Oct. 21, 1986), Schade filed a notice of location of a trade and manufacturing site embracing 80 acres in the N½ NW¼ sec. 8, T. 5 S., R. 11 W., Seward Meridian, Kenai Peninsula, Alaska. This land had been part of Roy F. Langley's 160-acre homestead entry which had been allowed by BLM on January 9, 1959, and relinquished by Langley on September 9, 1959. On September 2, 1964, Schade applied to purchase the land covered by his notice of location, and on March 14, 1975, BLM issued patent No. 50-75-0152 transferring 30 acres of the site to him. As a result of a successful judicial appeal, Schade was granted an additional 22 1/2 acres. Schade v. Andrus, 638 F.2d 122 (9th Cir. 1981). The patent for this additional acreage, Patent No. 50-83-0143, dated April 22, 1983, forms the basis of this proceeding. 1/

The patent stated that it was

[s]ubject to an easement for highway purposes, extending one hundred (100) feet each side of the center line of the East End Road, and transferred to the State of Alaska pursuant to the quitclaim deed dated June 30, 1959, and executed by the Secretary of Commerce pursuant to the authority of the Alaska Omnibus Act, Pub. L. 86-70, 73 Stat. 141.

On November 15, 1985, Schade filed an application for correction of patent No. 50-83-0143, pursuant to section 316 of FLPMA, 43 U.S.C. § 1746

1/ The patent described the following lands: W 1/2 NE 1/4 NW 1/4 NW 1/4, NW 1/4 NW 1/4 NW 1/4, N 1/2 SW 1/4 NW 1/4 NW 1/4, and NW 1/4 SE 1/4 NW 1/4 NW 1/4 sec. 8, T. 5 S., R. 11 W., Seward Meridian, Alaska.

(1982), and 43 CFR Subpart 1865, seeking removal of the 200-foot easement for East End Road from his patent. Schade contended that no road existed on the land in question in 1959, nor had a proposed road been surveyed and staked at that time. Thus, he argued that the June 30, 1959, quitclaim deed did not transfer any interest in that portion of East End Road which crossed his property, and that BLM therefore erred in encumbering his patent with the easement.

Schade outlined the history of East End Road. He alleged that, in 1959, East End Road had only been constructed to mile 11.5 and maintained to mile 10, far short of the mile 15.3 location of his patented land. He asserted that his family built the first trail to provide access to his property by tractor and 4-wheel drive vehicle, and that this trail was replaced by a pioneer access road constructed in 1961. Schade noted that in order to receive state financial assistance to construct this road, the settlers were required to grant a 100-foot wide easement to the State of Alaska for the road, and that the easement he granted embraced land within his homestead property, not the land in question. 2/

According to Schade, there were no State plans setting the location of the road, and its location was determined by the needs of the settlers in the area. He indicated that in 1962, Standard Oil of California, the owner of a lease in the area, widened the pioneer access road to mile 19 and graveled it to mile 14, and in 1966, the entire East End Road was upgraded with a gravel surface. In 1983 the entire road surface was improved with additional gravel, and, Schade noted, in 1984 the Alaska Department of Transportation had proposed to redesign and reconstruct the road from mile 12.5 to mile 21.

Schade also asserted that, because the land had been part of Langley's approved homestead entry from January 1959 through September 1959, it could not have been owned, held, or used by the Department of Commerce for any road activity when the June 30, 1959, quitclaim deed transferred existing roads to the State of Alaska. He also noted that several other entrymen received BLM patents without easements for East End Road, even though the road ran through their patented land. Schade submitted numerous documents, including statements of other settlers in the area, excerpts from contemporaneous journals, maps, and relevant statutory provisions, to support his factual allegations and legal conclusions.

By decision dated March 8, 1989, BLM denied Schade's application to correct patent No. 50-83-0143. BLM noted that East End Road was listed in the June 30, 1959, quitclaim deed under the classification of Federal-Aid Secondary Highway System, Class "A" Routes (FAS 414), and that the deed described the road system as consisting of 12.5 constructed miles and 12.5 proposed miles. BLM concluded that, because Schade's use and occupancy of his trade and manufacturing site began in September 1959 after the quitclaim

2/ Apparently, the road originally was to traverse Schade's homestead property, but the route was changed due to adverse conditions in the original location.

deed had transferred the proposed portion of East End Road affecting his site, the patent was correctly issued subject to the easement for East End Road.

BLM determined, however, that based on the evidence submitted by Schade, the width of the easement described in the patent was in error. BLM noted that East End Road was not specifically mentioned in SO 2665 as being a through or feeder road so it must be considered a local road with an established width of 50 feet on each side of the center line. Accordingly, BLM determined that the width of the easement should be reduced from 200 to 100 feet, and explained that the absence of an appeal of the decision by the State would be deemed a concurrence to the reduction.

In his statement of reasons (SOR), Schade argues that the June 30, 1959, quitclaim deed did not convey any interest in the proposed continuation of East End Road. He contends that the description in the deed indicates that the proposed road is a floating easement, and that, in order for a floating easement to attach, that proposed road had to be surveyed and marked, and notices had to be posted to inform the public of the exact location of the road. He claims that the extension of East End Road had not been specifically located at the time the deed was issued, and that, therefore, no easement for the proposed road existed. ^{3/} Schade asserts that the first easements for a public road in the area were granted by the settlers in October 1960, noting that he gave the State of Alaska a 100-foot wide easement across his homestead entry, not the subject land, for the road. Additionally, Schade points out that, although the deed describes the East End Road system as extending to Fox River, no road has yet been built to that point.

Schade also challenges BLM's decision on several other grounds. He asserts that his constitutional rights have been violated because he is the only person on East End Road who has had a 200-foot easement placed on his patent, and because the Federal Government ignored the principal of separation of powers by giving an interest in his land to the State of Alaska. He further argues that the issuance of the patent with the easement runs counter to the decision of the Ninth Circuit Court of Appeals which awarded him 22-1/2 acres because the easement diminishes the true amount of the land granted to him. ^{4/} Schade requests that the easement be removed from his patent.

^{3/} Schade indicates that he has attempted to obtain maps of the area for 1958 or 1959, but that neither BLM nor the State of Alaska has been able to locate the relevant maps. As part of its statement of reasons, the State included an Aug. 1957 map (Homer vicinity map No. 59) which shows East End Road terminating in sec. 6, T. 6 S., R. 11 W.

^{4/} Schade also argues that BLM failed to issue his patent "within the 2 years as ordered by the court" (SOR at 3). We note that the court did not establish a time frame within which BLM was required to issue the patent. Furthermore, the record shows that the patent was issued within 2 years of Nov. 16, 1981, the date BLM received Schade's payment for the land. See United States v. Braniff (On Reconsideration), 65 IBLA 94 (1982).

In its SOR, the State disputes BLM's decision to reduce the width of the easement. It agrees that East End Road was classified as a local road when the Secretary of the Interior administered the Alaskan road system.

It contends, however, that in 1957, the Commerce Department reclassified East End Road as a Federal-Aid Secondary "A" route, which was equivalent to a feeder road under the Secretary of the Interior's classification system. The State recognizes that the Commerce Department did not establish specific widths for its road classification system, but submits that it has always believed that the roads retained the widths originally fixed by the Secretary of the Interior. Because the easements reserved for feeder roads had a width of 100 feet on each side of the center line under SO 2665, the State contends that the width of the easement for East End Road in Schade's patent should remain 100 feet on each side of the center line of the road.

BLM did not submit an answer to either Schade's or the State's SOR.

[1] Section 316 of FLPMA, 43 U.S.C. § 1746 (1982), gives the Secretary of the Interior discretionary authority to correct patents or other documents of conveyance at any time where necessary in order to eliminate errors. 43 CFR 1865.0-1; 43 CFR 1865.0-3. The regulations define "error" as

the inclusion of erroneous descriptions, terms, conditions, covenants, reservations, provisions and names or the omission of requisite descriptions, terms, conditions, covenants, reservations, provisions and names either in their entirety or in part, in a patent or document of conveyance as a result of factual error. This term is limited to mistakes of fact and not of law. [Emphasis added].

43 CFR 1865.0-5(b). See Lone Star Steel Co., 101 IBLA 369, 373 (1988); Bill G. Minton, 91 IBLA 108, 110 (1986); Walter & Margaret Bales Mineral Trust, 84 IBLA 29, 31-32 (1984).

Schade contends that BLM based the easement included in his patent on the erroneous conclusion that the June 30, 1959, quitclaim deed conveyed to the State of Alaska the part of East End Road now crossing his property, even though that portion of the road had not been constructed nor had its location been surveyed, staked, and posted at that time. BLM admits that the road segment at issue had not been constructed in 1959, and that the planned route had not been surveyed or staked at that time. Thus, BLM did not base its decision on a factual error concerning the status of the road at the time the quitclaim deed was issued. Rather, BLM interpreted the deed as conveying the planned additional 12.5 miles of the East End Road system based on the language of the deed and the earlier legislative and Departmental directives. Any error BLM might have made in this regard would be a mistake of law, not of fact. Since 43 CFR 1865.0-5(b) only permits the correction of factual errors in an issued patent, Schade's application for correction of his patent was properly denied. See, e.g., Lone Star Steel Co., *supra*; Bill G. Minton, *supra* at 111-12; Walter & Margaret Bales Mineral Trust, *supra* at 32. For that reason, it is unnecessary to deal with the specific arguments raised by Schade.

[2] The regulations also provide that the authorized officer may initiate and make corrections in patents on his or her own motion, if all existing owners agree. 43 CFR 1865.3. Absent such consent, a patent may not be administratively corrected. Lone Star Steel Co., *supra*; Rosander Mining Co., 84 IBLA 60, 64 (1984). We have also held that reformation of a patent under section 316 of FLPMA, 43 U.S.C. § 1746 (1982), will be allowed where, *inter alia*, "the concerned administrative agencies do not object." Rosander Mining Co., *supra*. BLM determined that the width of the easement for East End Road should be reduced from 100 feet on each side of the center line to 50 feet on each side of the center line of the road. The State has filed an appeal, objecting to the reduction of the width of the easement included in the patent. The State of Alaska has an interest in the patent due to the inclusion of its easement, and is a "concerned administrative agency." Therefore, the State's disagreement with BLM's change precludes BLM from correcting the patent on its own motion, and BLM's determination to reduce the width of the easement must be reversed. 5/

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 affirmed in part and reversed in part.

Bruce R. Harris
Administrative Judge

I concur:

James L. Burski
Administrative Judge

5/ Given the State's disagreement, we need not decide whether the evidence it provided on appeal that the Commerce Department in 1957 upgraded the classification of East End Road to a Federal-Aid Secondary Highway, Class "A" Route, and its argument that such a road has the same width as a feeder road under the Secretary of the Interior's classification system (*i.e.*, 100 feet on each side of the center line) establishes the propriety of BLM's original easement reservation.