

RAMONA & BOYD LAWSON

IBLA 97-459

Decided June 4, 2003

Appeal from a New Mexico State Office, Bureau of Land Management, decision denying an application to correct a homestead entry patent. No. NMNM-96160.

Reversed.

1. Federal Land Policy and Management Act of 1976: Correction of Conveyance Documents—Homesteads (Ordinary): Generally—Patents of Public Lands: Corrections

A homestead entry patent may be amended, pursuant to section 316 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1746 (2000), when the applicant demonstrates by a preponderance of the evidence that the patent did not convey lands that the applicant and the United States mutually intended to convey by the patent. Unless otherwise shown, equity and justice favor such correction.

APPEARANCES: Richard W. Hughes, Esq., Santa Fe, New Mexico, for appellants; Grant L. Vaughn, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Santa Fe, New Mexico, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

Ramona and Boyd Lawson have appealed a June 4, 1997, decision issued by the New Mexico State Office, Bureau of Land Management (BLM), denying their application to correct homestead entry (NMNM-96160).

The Lawsons sought to have a patent amended to include 12 acres of public land in Lot 10, sec. 22, T. 18 N., R. 12 E., New Mexico Principal Meridian, San

Miguel County, New Mexico. ^{1/} The patent (Patent No. 1257) had been issued to Cristino Rivera in 1888, pursuant to the Homestead Act of May 20, 1862 (the Homestead Act), as amended, 43 U.S.C. § 161 (1970) (repealed effective Oct. 21, 1976, by section 702 of the Federal Land Policy and Management Act of 1976 (FLPMA), Pub. L. No. 94-579, 90 Stat. 2787). ^{2/} This land the Lawsons seek lies along the Pecos River, near Terrero, New Mexico, and contains a house, cabin, and other structures. Lot 10 is adjacent to "Tract 43," which is the land identified in a 1925 independent resurvey as being the land conveyed by Patent No. 1257.

The exterior boundaries and subdivisions of T. 18 N., R. 12 E., New Mexico Principal Meridian, were surveyed in 1883. Rivera filed his application for homestead entry with the General Land Office (GLO) on February 5, 1884. His application described the land he was seeking as the S $\frac{1}{2}$ SW $\frac{1}{4}$, NE $\frac{1}{4}$ SW $\frac{1}{4}$, and NW $\frac{1}{4}$ SE $\frac{1}{4}$, sec. 22, T. 18 N., R. 12 E., New Mexico Principal Meridian, San Miguel County, New Mexico, "containing 160 acres." Rivera's final Homestead Entry Certificate (No. 1257) was issued on April 2, 1885. The patent, issued on May 3, 1888, describes the conveyed land as the S $\frac{1}{2}$ SW $\frac{1}{4}$, NE $\frac{1}{4}$ SW $\frac{1}{4}$, and NW $\frac{1}{4}$ SE $\frac{1}{4}$, sec. 22, by reference to the 1883 public land survey. The lower one-half of the patented tract is offset to the west by one quarter quarter section, and for convenience we will refer to the parcel conveyed to Rivera as being "stair step" in shape. Rivera's parcel conforms with section 1 of the Homestead Act, which provided for entry and patent, of "one quarter-section or a less quantity of unappropriated public lands, to be located in a body in conformity to the legal subdivisions of the public lands." 43 U.S.C. § 161 (1970). The patent specifically stated that one hundred and sixty acres were being conveyed. ^{2/}

On January 11, 1892, Presidential Proclamation No. 12, issued pursuant to section 24 of the Act of March 3, 1891, ch. 561, 26 Stat. 1103, designated all of T. 18 N., R. 12 E., New Mexico Principal Meridian, San Miguel County, New Mexico, as a part of the Pecos River Forest Reserve, and reserved the designated land from entry or settlement. This action closed the land in Lot 10 to further entry and patent under the Homestead Act. Ramona & Boyd Lawson, 94 IBLA 220, 221 (1986);

^{1/} All of the public land in T. 18 N., R. 12 E., New Mexico Principal Meridian, San Miguel County, New Mexico, is now within the Santa Fe National Forest, and is administered by the Forest Service, U.S. Department of Agriculture.

^{2/} Ramona Lawson is Cristino Rivera's granddaughter, and Boyd Lawson is her husband.

^{3/} The fact that Tract 43 does not contain the full 160 acres stated in Rivera's patent does not, in and of itself, mandate patent correction. If Rivera intended to obtain patent to the land in Tract 43 and the Land Office intended to convey the same tract, there would be no mutual mistake.

John E. Henry, 30 L.D. 158, 159 (1900). However, all lands previously "embraced * * * in any legal entry" were excepted from the reservation. 27 Stat. 998, 999. The Forest Reserve was renamed the Pecos National Forest by Executive Order (EO) No. 908, dated July 2, 1908, and incorporated into the Santa Fe National Forest by EO No. 2160, dated April 6, 1915.

The GLO independently resurveyed the exterior boundaries and subdivisions of T. 18 N., R. 12 E. in 1925. During the course of the survey, the surveyor established the location of the boundaries of Rivera's homestead, identified the homestead tract as Tract 43, and tied Tract 43 to the new survey. Tract 43 contains 147.937 acres. Irregularly-sized lots of public land and tracts of private land around Tract 43 (including Lot 10) were identified and assigned tract or lot numbers.^{4/}

To visualize the nature of the problem in this case, it is helpful to compare the depiction of the location of the tract patented to Rivera as shown on the 1883 survey plat to Tract 43 as shown on the 1925 survey plat. As noted earlier, the patent described the land as the S $\frac{1}{2}$ SW $\frac{1}{4}$, NE $\frac{1}{4}$ SW $\frac{1}{4}$, and NW $\frac{1}{4}$ SE $\frac{1}{4}$, sec. 22. As depicted on the 1883 survey plat, the Pecos River flows diagonally through this stair step shaped parcel, entering the parcel near the center of its northern boundary and exiting the parcel near the center of its southern boundary. (See Figure 1 below.) This stair step shape affords riparian land along the Pecos River as it runs through the southwest 1/4 of sec. 22. As shown on the 1883 plat, the cabin on the west side of the river would be well within the boundaries of the parcel.

The parcel described as Tract 43 in the 1925 survey preserves the stair-step shape but shifts it to the southwest. Most important, it radically alters the parcel's relationship to the river, and hence, to the cabin and other structures that appellants assert were used by Rivera in support of his patent application. Since the land now in Tract 43 can no longer be described in terms of the legal subdivisions in the original patent as a result of the 1925 survey, it is helpful to identify Tract 43 as consisting of 4 approximately square blocks that roughly correspond to the former legal subdivisions: (1) block 1 would correspond to the former SW $\frac{1}{4}$ SW $\frac{1}{4}$; (2) block 2, the former SE $\frac{1}{4}$ SW $\frac{1}{4}$, which lies directly to the east of block 1; (3) block 3, the former NE $\frac{1}{4}$ SW $\frac{1}{4}$, lies to the north of block 2; and block 4, the former NW $\frac{1}{4}$ SE $\frac{1}{4}$, lies to the east of block 3. (See Figure 2, below.)

^{4/} The independent resurvey is discussed at some length in Ramona & Boyd Lawson, 94 IBLA at 223. As a result of the 1925 resurvey, Tract 43 appears to have shifted slightly to the southwest of its originally-described position in the S $\frac{1}{2}$ SW $\frac{1}{4}$, NE $\frac{1}{4}$ SW $\frac{1}{4}$, and NW $\frac{1}{4}$ SE $\frac{1}{4}$, sec. 22, T. 18 N., R. 12 E., New Mexico Principal Meridian, San Miguel County, New Mexico. The GLO surveyor placed most of the tract in sec. 22. However, portions of Tract 43 are in secs. 21, 27, and 28.

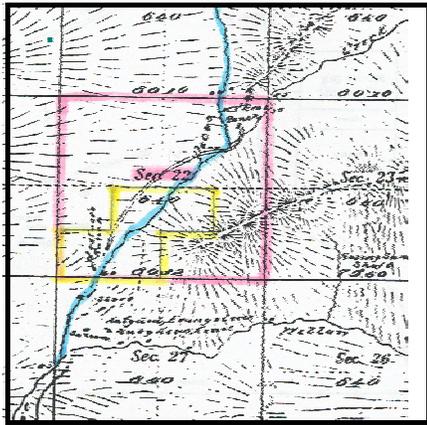


Figure 1
Patented parcel
as shown on
1883 survey plat.

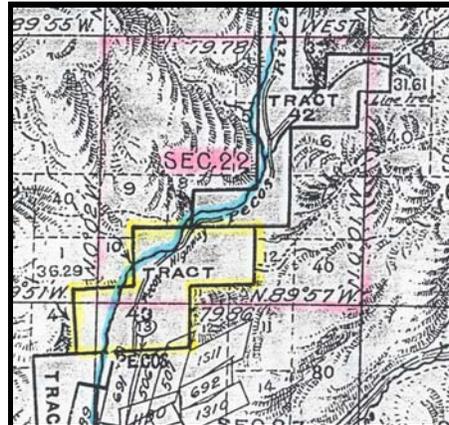


Figure 2
Tract 43 on map of
Sec. 22 after 1925
resurvey.

The Pecos River, however, does not divide Tract 43 diagonally. It enters Tract 43 on the northern boundary of block 3 not far from block 4 and exits Tract 43 near the center of the western boundary of block 3. It reenters Tract 43 at the northern boundary of block 1 and exits again at the southern boundary of block 1. Thus, as a result of the 1925 survey, the portion of the Pecos River and cabin on the west bank at the center of the parcel under the 1883 survey were now shown to be outside Tract 43 in Lot 10, which is immediately to the west of block 3.

In Ramona & Boyd Lawson, supra, the Board affirmed an April 11, 1985, BLM decision rejecting the Lawsons' December 5, 1981, color-of-title application (NM 52176). In their color-of-title application the Lawsons sought to acquire Lot 10 under the Color of Title Act, as amended, 43 U.S.C. §§ 1068–1068b (2000). In our decision we found that the Lawsons were not entitled to the land under the Color of Title Act, but noted that the decision did not preclude the Lawsons from seeking correction of the patent to the land they sought. Ramona & Boyd Lawson, 94 IBLA at 227 n.7.

On November 3, 1995, the Lawsons filed the application for a correction of Homestead Entry Patent No. 1257 pursuant to section 316 of FLPMA, as amended, 43 U.S.C. § 1746 (2000), and its implementing regulations, 43 CFR Subpart 1865. They claimed that the lands originally patented to Rivera were either improperly

surveyed prior to patent or improperly described in the patent, and that Rivera believed that the additional 12 acres in Lot 10 had been included in his patent. The Lawsons also asserted that, because of this error, the patent did not include the land containing improvements Rivera had erected and used to establish his entitlement to a patent under the Homestead Act.

In its June 1997 decision, BLM denied the Lawson's application. The stated reason for denial was that there was no showing of an error of fact, either in the original survey on which the patent was based or in the description of the land conveyed by the patent, and that equity and justice did not favor correction. BLM concluded that nothing in the record demonstrated that Rivera had not received the land he was entitled to, or that the 12 acres sought by the Lawsons should have been conveyed to Rivera. (Decision at 1–2.) Relying on language in Lawson, BLM held that there was no confusion regarding the location of the patented land when it was resurveyed in 1925, and that the portion of Lot 10 sought by the Lawsons "has always been outside of the Rivera homestead." (Decision at 2.) BLM also found that the 12 acres in Lot 10 had not mistakenly been excluded from the original patent, noting that the homestead tract would be significantly distorted if this tract had been included. Id.^{5/} The decision stated that BLM was not convinced that Rivera had relied upon the improvements on Lot 10 to support his patent, that the house used for proof of homestead was more likely to have been a house located on the patented homestead, and that there was no mention of a cabin or stone cellar in the homestead entry file. Id.

BLM also found that the equities did not support patent correction because the Lawsons and their predecessors-in-interest had known that the 12-acre parcel was not included in Tract 43 since at least 1925, and that no prior action was taken to correct the patent until the Forest Service attempted to halt the Lawsons' continued trespass. (Decision at 1–2.) BLM further held that if a factual error were shown and equities favored patent correction, the Government's interests would be unduly prejudiced by the amendment:

^{5/} BLM relied on a May 9, 1997, memorandum prepared by the Field Solicitor when drafting its decision. The Field Solicitor stated that if there was a mistake in surveying it was likely that the missing 12 acres were distributed "all the way around the boundary of tract 43 and not solely in any particular corner," which would not disrupt the overall regular shape of the tract, as described in the patent. (Memorandum to Deputy State Director, Resource Planning, Use and Protection, New Mexico State Office, BLM, dated May 9, 1997, at 3.) The Field Solicitor concluded: "There is no basis, therefore, to determine that any mistake in designating the patented lands would have left out the lands for which the Lawsons now apply [in Lot 10]."

Information was requested from [the] Forest Service Pecos/Las Vegas Ranger District as to the land status, and they informed us that they consider the Lawson use of the land to be an unauthorized occupancy. The District Ranger also notes that the Pecos River runs through this area and has been designated as a Wild and Scenic River by Congress [pursuant to section 3(a) of the Wild and Scenic Rivers Act, as amended, 16 U.S.C. § 1274(a) (2000)]. Also, under Section 8 of the Wild and Scenic Rivers Act [16 U.S.C. § 1279 (2000)] all public lands adjacent to the river are withdrawn from disposition under the public land laws. The Forest Service expresses their position that they do not believe that approval of a patent correction would be in the greater public interest.

(Decision at 3.) Finally, BLM stated that it was "not assured" that correction of the patent would not adversely affect third-party rights, noting that Ramona Lawson has four siblings who could claim an interest in the 12-acre parcel if the decision were favorable to the Lawsons. Id. The Lawsons appealed.

Before addressing the merits of the appeal we find it appropriate to note the parameters under which this appeal will be adjudicated. Lot 10 is owned by the United States. The Lawsons do not dispute this fact and have not challenged our ruling in Lawson that the land in Lot 10 has always been outside the boundaries of the Rivera homestead and has been continuously owned by the United States. 94 IBLA at 224; see id. at 226–27. In the first Lawson appeal, the Lawsons asserted that Lot 10 was once part of patented Tract 43, but was subtracted by the 1925 independent survey, thereby basing their claim of title on the 1888 patent document from the United States as the source of title to Lot 10. However, adverse possession against the United States based on the mistaken belief that a tract was embraced in one's patented holdings is inadequate because it lacks the basic element of a claim or title derived from some source other than the United States. The resurvey indicates that title to Lot 10 has always been in the United States. The Lawsons' predecessors did not challenge the resurvey results. The question now before us is whether the land in Lot 10 (as shown in the 1925 resurvey plat) was erroneously excluded from the 1888 homestead entry patent to Rivera warranting amendment of Patent No. 1257. To answer this question we must initially determine whether the evidence supports a finding that Rivera intended to claim land in Lot 10 when he made his homestead entry.^{6/}

^{6/} The tract the Lawsons seek has not been precisely described. See Application at 2; SOR at 34. We do not find this flaw in the application fatal, as the application could be amended by submitting an accurate description.

[1] Section 316 of FLPMA grants the Secretary of the Interior the authority to correct patents disposing of public lands under other Federal statutes to eliminate errors. 43 U.S.C. § 1746 (2000). This authority has been delegated to BLM, and BLM holds the discretionary authority to correct patents of public land to eliminate mutual mistakes of fact as to description of land conveyed by the patent document. 43 CFR 1865.0-1 and 1865.0-5(b); Foust v. Lujan, 942 F.2d 712, 714-17 (10th Cir. 1991), cert. denied sub nom., Northern Arapaho & Shoshone Indian Tribes of Wind River Indian Reservation v. Foust, 503 U.S. 984 (1992); Mary D. Hancock, 150 IBLA 347, 350 (1999); Ben R. Williams, 57 IBLA 8, 12 (1981). BLM has promulgated regulations implementing this authority (43 CFR Subpart 1865), and 43 CFR 1865.2 provides:

Upon the authorized officer's determination that all of the requirements of the Act for issuance of a corrected patent or document of conveyance have been met, the authorized officer shall issue a corrected patent or document of conveyance. [Emphasis added.]

To justify this remedy, the party applying for amendment must demonstrate an error in the description of the land in the patent which results in the inclusion of land the patentee and the United States had not intended to be conveyed and/or excludes land the patentee and the United States had intended to be conveyed. If both the United States and the applicant were mistaken regarding the boundaries or legal description, it would be a correctable mistake of fact. Foust v. Lujan, 942 F.2d at 715; see Mary D. Hancock, 150 IBLA at 351-52; Frank L. Lewis, 127 IBLA 307, 309 (1993); George Val Snow (On Judicial Remand), 79 IBLA 261, 262 (1984). This showing of error is the legal prerequisite for correction, and "it must clearly appear that an error was, in fact, made. Otherwise, an application to amend would be barred as a matter of law." Ben R. Williams, 57 IBLA at 12.

If an error exists, the Department will correct the patent if substantial Government or private interests are not unduly prejudiced, because substantial equities of the applicant will thereby be preserved. Mary D. Hancock, 150 IBLA at 351; Mantle Ranch Corp., 47 IBLA 17, 37-38, 87 I.D. 143, 153-54 (1980). Thus, equity and justice must also favor correction. Mary D. Hancock, 150 IBLA at 351; Frank L. Lewis, 127 IBLA at 309-10; George Val Snow (On Judicial Remand), 79 IBLA at 262; Ben R. Williams, 57 IBLA at 13. The ultimate burden falls on the party seeking the correction. George Val Snow (On Judicial Remand), 79 IBLA at 264.

As noted above, Rivera's final Homestead Entry Certificate (No. 1257) was issued on April 2, 1885, and Patent No. 1257 was issued on May 3, 1888. When the land in T. 18 N., R. 12 E., was resurveyed in 1925, Devendorf, the surveyor, determined that the exterior and subdivisional lines could not be reestablished in

their true original position. (Transcript of Testimony before District Court, San Miguel County, New Mexico, Rivera v. Simpson, No. 79-188 (Transcript) at 82-83.)^{7/} As a result, Devendorf established the exterior and subdivisional lines of that township by independent resurvey. In the process, Devendorf sought to protect the outstanding tracts of patented land, including the land which had been conveyed to Rivera, by establishing their true original position. See Ramona & Boyd Lawson, 94 IBLA at 223-24 (citing Manual of Instructions for the Survey of the Public Lands of the United States, 1973, §§ 6-5 and 6-33, at 145, 151).

The most compelling evidence of the intent of the parties is found on the face of the 1883 survey plat, which was in existence and is most probably the primary document used to show the subdivisional boundaries when Rivera's homestead entry documents were drafted. The landmark on that plat that would be familiar to both the Land Office employee and Rivera is the Pecos River. If Rivera's homestead was located as shown on the 1883 survey plat, it would encompass the optimum amount of arable land and the house, cabin, structures, and improvements in question. The evidence now before us, including survey notes taken in 1925, indicate that Rivera's family continuously controlled and maintained those structures since their construction. Neither the BLM nor the Forest Service has tendered evidence to the contrary.

Additional evidence was submitted through sworn affidavits executed by Ramona Lawson. Cristino Rivera died in 1918, and Mrs. Lawson was born in 1930 (Transcript at 94). Although she never personally knew her grandfather, her statements are based on her recollection of the oral history of her family, which had been passed from generation to generation.^{8/} We find it important that Mrs.

^{7/} On Sept. 16, 1996, the Forest Service submitted four portions of the State court proceeding in Rivera v. Simpson, (L through O) to BLM. The selected passages were offered as a chronology of events related to this appeal.

^{8/} It could be argued that Mrs. Lawson's statements are merely hearsay, with little or no weight. However, as this Board noted in David Q. Tognoni, 138 IBLA 308, 319 n. 8 (1997), the "Administrative Procedure Act (APA) provides that '[a]ny oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence.' 5 U.S.C. § 556(d) (1994). Hearsay evidence is not inadmissible per se. Bennett v. National Transportation Safety Board, 66 F.3d 1130 (10th Cir. 1995). Hearsay evidence that meets the standard of section 556(d) of the APA can be weighed in agency proceedings according to its truthfulness, reasonableness, and credibility. Veg-Mix, Inc. v. U.S. Department of Agriculture, 832 F.2d 601 (D.C. Cir. 1987)."

The Manual of Instructions for the Survey of the Public Lands of the United States
(continued...)

Lawson's statements are supported by the other evidence which is discussed throughout this decision. For example, Lawson was able to state, from her own knowledge, that her parents (Encarnacion and Ignacita Rivera) lived in the house on Lot 10 and her uncle and his wife (Luis and Refine Rivera) lived for a short time on Tract 43.^{2/} (1995 Lawson Affidavit at 4-5; 1997 Lawson Affidavit at 2-3; Transcript at 162-63.)

In Foust v. Lujan, *supra*, the evidence supported a finding that the entryman and the government believed that a house and other buildings constructed by the entryman and used in support of his entry were located within the patented tract. However, they were later found to be outside that tract. The house and other buildings were described by the entryman and his two witnesses in the final homestead proof, filed in 1935. In addition, an agent for the Department who inspected the tract prior to the 1936 patent and a neighbor who had lived near the tract at the time of entry and patent submitted affidavits with the 1982 patent correction application attesting to the fact that the house and other buildings were those described as supporting issuance of patent. 942 F.2d at 715-16. As in this case, there was a Government resurvey of the area and it was found that the buildings were actually located outside the patented tract. *Id.* at 713.

In George Val Snow (On Judicial Remand), *supra*, the original entryman had delineated his entered and later patented land on the ground by erecting a fence enclosing a dwelling and other improvements. All of the structures were still in existence when the patent correction application was filed. 79 IBLA at 265. In Mary D. Hancock, the evidence supported a finding that the original entryman had constructed a house and cultivated nearby lands not in the patented tract. 150 IBLA at 348, 352. The entryman's statement of his settlement activity in 1915-16 in his final proof was corroborated by the statement of the applicant for correction that she had observed the remains of the house when she acquired the land following the entryman's death in 1933. *Id.* at 348 n.2.

^{8/} (...continued)

(1973) at ¶¶ 5-10 and 5-11 makes it clear that testimony may be given weight depending on its completeness and its verification of data on the ground.

^{2/}In her Affidavit, Lawson states that her family built the house on Tract 43 sometime in the early 1900's. She states further that following Rivera's death in 1918, the land on the east side of the river was conveyed to Cristino Rivera's son, Luis, and that the house fell into disrepair after Luis's death in the late 1930's, and has completely disappeared. (1997 Lawson Affidavit at 2-3.) The photo at Lawson Ex. M-1 confirms the state of disrepair to which the house had fallen.

In Foust, Val Snow, and Hancock, there was sufficient evidence that the original patent failed to include land and improvements which the patentee and the United States intended to be included in the patent. The common thread in each of these cases was the evidence that the entryman had used the improvements to support the entry. Compare with Mary D. Hancock, 150 IBLA at 352 ("the conclusion that an error was made is compelled by the fact that an entryman would not complete his legally-required improvements on lands and then apply for other lands").

As described above, if the location of subdivision lines and physical features were accurately depicted on the 1883 survey plat, the Pecos River would intersect the north side of the upper row of blocks (Block 3 and 4) at their common corner (about the middle). The river would continue southwesterly, and exit Block 3 on the south at about its midpoint, which is also the midpoint of the north side of Block 2. It would then continue in a southwesterly direction and pass through the southerly boundary at the corner common to Blocks 1 and 2. The 1883 plat also shows a road running southwesterly through the northernmost boundary of the tract, passing close to the SW corner of Block 3 and exiting the tract just to the west of the river. The plat also places "Case's Ranch" west of the road just before it exits the tract.

On the 1925 resurvey plat the Pecos River crosses the northernmost boundary of Tract 43 roughly at the midpoint of block 3 and west (rather than east) of the road. It proceeds in the same southwesterly course, exiting block 3 on its westerly boundary. It re-enters the tract at the northerly boundary of block 1 and crosses the southerly boundary in the middle of block 1. At all times, the river is shown to be west of the highway. The 1925 resurvey plat does not depict Case's Ranch, but the Lawsons have placed it in roughly the same position in relation to the boundaries of Tract 43 shown on the 1925 plat, as it appears on the 1883 plat. (Ex. L to SOR.)

On Exhibits K and L to the SOR the Lawsons have shown the location of the river and highway, and the location of the house on Tract 43 and the house on Lot 10. The house on Tract 43 is shown to be to the west of the highway and east of the river, and the house on Lot 10 is west of both the highway and the river. In their Application at 2-3 they state that the house in Lot 10 was built by Rivera "in a large open area along the west bank of the Pecos River." If Rivera and the United States relied on the location of the river and other physical features shown on the 1883 survey plat when determining what lands were to be patented in 1888, the patent would include the land containing both houses, and there was a mutual mistake of fact regarding the proper description of the lands to be patented.

Importantly, the configuration of the S $\frac{1}{2}$ SW $\frac{1}{4}$, NE $\frac{1}{4}$ SW $\frac{1}{4}$, and NW $\frac{1}{4}$ SE $\frac{1}{4}$ sec. 22, as depicted on the 1883 survey plat follows the sinuosities of the Pecos River, which has a narrow, steep-sided, twisting canyon. The location of the two offset

80-acre rectangles would allow Rivera to acquire the greatest amount of tillable bottom land possible while conforming to the public-land survey system. (SOR at 10; see Decision at 2.) On the other hand, the patented tract, as shown on the 1925 resurvey, excludes tillable land along the river bottom and includes a steep untillable hillside. See Lawson Ex. K. In this respect this case is similar to Foust v. Lujan, supra. In that case the court noted that the patent includes steep hillside and excludes land suitable for building a home. The decision stated that this fact “does raise questions about why [the applicant] would have filed a homestead application, and why the United States would have issued a patent, for land that was too steep for a home.” 942 F.2d at 715 (emphasis added). It is also similar to Mantle Ranch Corp. In that case the entryman “stated that at the time he filed his homestead application in 1929, he had a surveyor complete the papers for him, and he surmised that the surveyor used an old map which did not have the Yampa River properly located.” Mantle Ranch Corp., 47 IBLA at 21, 87 I.D. at 145. As a result, the patented tract included “80 acres * * * the greater portions of which is sheer or steep sandstone cliffs on the opposite side of the river from the improved portion of the ranch, and which is virtually inaccessible and unusable for any purpose associated with the ranch.” Id.

Rivera’s final proof of homestead entry, was filed on April 2, 1885. In his Final Affidavit, Rivera attested to having "made actual settlement upon and having cultivated said land, having resided thereon since the 23[rd] day of November, 1877." (Lawson Ex. B, "Homestead Proof—Testimony of Claimant," dated April 2, 1885.) He noted that his entry was specifically supported by improvements consisting of a "[h]ouse, corral, fences and cultivated land valued at 500 dollars." ^{10/} Id. He also reported that he had cultivated "about 15 acres for six years." Id. Affidavits confirming Rivera's statements were submitted by two witnesses, Epifanio Gonzales and Crecincio Roibal, who were ranchers in San Miguel County, New Mexico. The evidence strongly indicates that Rivera and Roibal were illiterate. Both signed the patent application documents with an "X." (SOR at 6–7.) Thus, it is most likely that the information in the final proof documents had been given to the Register of the Land Office, who wrote it down. It is also likely that Rivera and his witnesses did not speak English, raising "question as to the precise accuracy or completeness of what he wrote down." Id. at 7.

^{10/} In answer to the question "of whom does your family consist," Rivera replied: "Myself and five children my wife being dead." ("Homestead Proof—Testimony of Claimant," dated Apr. 2, 1885.) Ramona Lawson states that Rivera had two wives, Theodora, who died "not long after" the last of their five children was born, and Apolonia, who had six children, one of whom was Lawson's father (Encarnacion), who was "very young when his mother died." (Lawson Exhibit I, 1995 Lawson Affidavit, at 2.)

Rivera held the land until his death in 1918. The land then passed to his heirs, including his son, Encarnacion, who is Ramona Lawson's father. Shortly after Rivera's death the land and improvements in Lot 10 were transferred to Encarnacion Rivera. (Application at 2; 1995 Lawson Affidavit at 3–4.) Encarnacion Rivera's interest passed to his wife, Ignacita Rivera, upon his death in 1966.^{11/} Ignacita conveyed her interest to the Lawsons by quitclaim deed on August 2, 1979 (Lawson Ex. E), and died in 1982. In a quiet title decision issued by the State court in 1979, ownership of Tract 43 was parceled among the heirs of Ignacita Rivera and confirmed the Lawsons' ownership of the improvements in Lot 10.^{12/}

The Lawsons state that they have resided in the house on Lot 10 three to four months a year since 1982. The Lawsons installed a pump to bring water from the river while Ramona's parents were alive, installed electricity in the house sometime after Encarnacion's death in 1966, moved into the house after Ignacita's death in 1982, added a porch and patio to the cabin, and refurbished and added to the stone cellar (turning it into a guest cabin). (1995 Lawson Affidavit at 5–6.)

The Lawsons maintain that the house, cabin, and stone cellar on Lot 10 were built by Rivera and were used to support the homestead entry. They contend that "[t]here can be no doubt that, having gone to great difficulty to construct the house and cabin, Cristino Rivera intended that his patent include the land on which those structures were situated." (Application at 3.) The Lawsons state that Rivera and his successors-in-interest have continuously used, occupied, and maintained the land and improvements the Lawsons now seek in the good faith belief that they owned the land and improvements, and that during this entire time the United States made no attempt to eject them. "The Riveras and the Lawsons have always considered what is now designated as Lot 10 to be their home." *Id.* at 4.

The Lawsons have submitted a tree-ring analysis report which supports the conclusion that the house and cabin in Lot 10 were the homestead entry improvements. (SOR at 8–9; Lawson Ex. G-H.) Fourteen tree-ring core samples were taken from logs in the house and cabin in December 1994, and sent to Jeffrey S. Dean, a professional dendrochronologist on the faculty of the Laboratory of Tree-Ring Research at the University of Arizona. (Lawson Ex. H.) The Lawsons state

^{11/} It is not clear that the description of the land conveyed following Encarnacion Rivera's death included land in Lot 10. See Ex. D attached to Application.

^{12/} In its June 1997 decision, BLM speculated that the other heirs of Ignacita Rivera may claim an interest in Lot 10, given the "family legal battle" over Tract 43. (Decision at 3.) However, there is no indication that any of them have sought to do so, or any basis for ruling that any family or other third party rights will be adversely affected by correction of the patent to include land in Lot 10.

that Professor Dean, who has 30 years of experience with analysis of southwestern United States tree rings, concluded that the cabin was built in 1882 or very soon thereafter. (Letter to Thomas C. Windes, Archaeologist, from Dean, dated January 19, 1995 (Dean Letter) (Ex. G-2 attached to Application), at 1-2; see Dean Affidavit (Lawson Ex. H).)

Dean first reported that the house was built "sometime after 1877," the "latest date" attributed to the outermost ring of one of the five core samples taken from the house. (Dean Letter at 2.) He later revised his estimate to "not long after 1877," based on his conclusion that the logs were squared for cosmetic reasons, and that the squaring-off was not likely to have appreciably reduced the size of the logs.^{13/} (Dean Affidavit.) The Lawsons assert that this tree-ring analysis confirms their understanding that the house was constructed by Rivera around the time of his settlement and was a structure referred to in his homestead entry. BLM does not dispute the fact that the house and cabin were in existence at the time of the 1888 patent to Rivera, but contends that they "could have been" erected by someone other than Rivera. See Decision at 2; Answer at 6-7. However, BLM does not identify who may have constructed the buildings, and there is no evidence in the casefile supporting this speculation.

In 1995 Ramona Lawson prepared an affidavit in support of the application for amendment. That application was supplemented on appeal. Ramona states that Rivera raised cattle, horses, hogs, goats, and sheep, and hand-cleared the flat land surrounding the house and cabin, plowing it with oxen and planting wheat and barley.^{14/} (1995 Lawson Affidavit at 2-3.) Ramona attests that her mother told her that the house on Lot 10 was built by Rivera "in the 1870's," was the house in which he lived at the time of patent, and that he intended to include that house in his entry (1995 Lawson Affidavit at 1.) She states that prior to moving into the house, Rivera lived in the partially underground and thick-walled "stone cellar ('soterano')," which survives just west of the house on Lot 10, and that after the house was built Rivera used the cellar to store food from his garden. Id. Lawson states that Rivera also built

^{13/} The Lawsons correctly note that Professor Dean's analysis of the logs from the house was slightly complicated by the fact that the logs had been "squared off," removing some of the outer tree rings, but that Professor Dean was confident that only a few rings had been removed. (SOR at 9, discussing Aug. 15, 1995 Dean Affidavit (Lawson Ex. H).)

^{14/} Lawson did not specifically identify the 15-acre plot which Rivera stated that he had cultivated when he applied for patent. ("Homestead Proof—Testimony of Claimant," dated Apr. 2, 1885.) The land in the canyon bottom in Tract 43 and Lot 10, is fairly narrow, being between 150 and 650 feet wide. See Ex. K attached to SOR.

the nearby cabin, a large, two-story barn "about 120 feet from the house," a saw mill "at the mouth of the canyon, behind the house and cabin," a flour mill ("molino") very near the barn between a ditch ("acequia") which fed water to the mill, and the river, and a "very large corral * * * behind and to the west of the house." *Id.* at 2-3. She states that, although no traces of the "corral" referred to in Rivera's patent application remain today, she played on it as a young child. An old photograph of the corral was attached to SOR as Ex. M-2.

Following Rivera's death in 1918, the tract containing the house, cabin, and stone cellar and immediately surrounding land on the west side of the river were conveyed to Ramona's father. (1995 Lawson Affidavit at 4; 1997 Lawson Affidavit at 3.) Her father raised cattle, horses, hogs, goats, and sheep on that tract. *Id.* She recalls living in the house with her father and mother and siblings. "As a child, I helped out by milking the cows in the barn, and chopping and carrying wood back to the house, and bringing water in buckets from the Pecos River to the house." (1995 Lawson Affidavit at 4.) She also notes that she was called upon to retrieve food from the garden which was stored in the stone cellar. *Id.* Rivera's heirs paid property taxes every year since 1913, when New Mexico became a state, and the Lawsons allege that these taxes included payment for Lot 10. (SOR at 33; Application at 5; 1995 Lawson Affidavit at 7.) But see 94 IBLA at 222 n. 3 (not clear whether taxes were paid for Lot 10).

The evidence strongly supports a conclusion that the error in this case resulted from the mutual reliance upon the depiction of the subdivisional boundaries as they relate to the location of the river and natural landmarks shown to be in section 22 on the official plat of the 1883 survey of T. 18 N., R. 12 E., New Mexico Principal Meridian. Relatives of Rivera have openly lived on or controlled the land they now claim since the 1880's. There is no evidence that the structures now in Lot 10 were either built by or used by anyone other than Rivera and his heirs for the past 120 years.

We turn, therefore, to the equity and justice of the matter.

In his 1925 resurvey field notes, Devendorf reported finding a house in Tract 43 and another house in Lot 10:

The canyon bottom outside the claim, NW of angle pt 3, contains fields and a house and is improved with the claim, with no apparent effort to separate the claim along the boundary. I understand that part of the Rivera family lives on the adjoining land, and has a forest service lease. I notified Mrs. Rivera at the house on the claim, that I was making the survey and that the other house was not on the tract, with no interest

being shown, except to state that they know the other house was on public land.

(Field Notes at 529.) Devendorf's survey was approved on February 14, 1928, and accepted on July 10, 1928.^{15/}

The BLM urges rejection because during the course of his 1925 resurvey, Devendorf noted that a Mrs. Rivera had stated that the house she was living in was not on the patented tract.^{16/} (Field Notes at 529; Decision at 2.) On its face, this notation indicates that one of Rivera's descendants was aware that the structure and the associated land had not been conveyed to Rivera. However, standing alone, it does not support BLM's inference that when the patent was issued, Rivera and the United States believed that the tract as depicted on the 1883 plat excluded the house and improvements now on Lot 10.

In his notes, Devendorf, the surveyor who undertook the 1925 independent resurvey, noted that he talked to Mrs. Rivera at "the house on the claim," and told her "that the other house was not on the tract, with no interest being shown, except to state that they knew the other house was on public land." (Field Notes at 529.) BLM construes this as an admission by Ramona Lawson's predecessor-in-interest, presumably her mother (Ignacita Rivera), that she and her husband knew that the house in Lot 10 was on public land since 1925. (Decision at 1-2.) As noted by the Lawsons, there is a serious question regarding whether Devendorf spoke to Lawson's mother (Ignacita Rivera), the wife of Encarnacion Rivera, or the wife of Luis Rivera (Refine Rivera). The disposition of the estate of Cristino Rivera in 1918 had resulted in the distribution of the land east of the river to Luis Rivera, who resided on that tract until his death in the late 1930's. It is likely that Devendorf talked to Luis's, and not Encarnacion's, wife. (1997 Lawson Affidavit at 2-3; see 94 IBLA at 222 ("Ignacita Rivera denies that in 1925 a surveyor tried to contact her or discuss the Rivera patent.") Nor can we conclusively determine from the survey notes that Lawson's mother or even her father, the Lawsons' predecessors-in-interest, knew that the house on Lot 10 was not on the patented tract.

^{15/} BLM performed a corrective resurvey of lines 1-2 and 2-3 of Tract 43 in 1981, to restore corner AP-2 (second Angle Point). See Transcript at 87 (corner AP-2 was "slightly out of position, some 30 feet or so"). The 1981 resurvey was accepted on Oct. 5, 1981.

^{16/} Devendorf identified this house as being 4.52 chains (or 298.32 feet) from the SW corner of the NE $\frac{1}{4}$ SW $\frac{1}{4}$ sec. 22.

When the land in T. 18 N., R. 12 E., was resurveyed in 1925, Devendorf was unable to reestablish the exterior and subdivisional lines in their true original position. His survey notes state that he found two monuments which he believed to be the two monuments marking the most southerly line of the patented tract and used these monuments as the basis for establishing the remaining six monuments representing the corners of Tract 43 by metes and bounds. (Field Notes at 522-529.) We find the fact that the corners were established during the course of an independent resurvey to be instructive.

An independent resurvey, which would establish new section lines without regard to the original survey, may be resorted to "if there are intolerable discrepancies in the original survey." (Manual of Instructions for the Survey of the Public Lands of the United States (1973) at 149.)^{17/} If, in 1925, it was found that there were intolerable discrepancies in the original survey, we cannot now presume that the original 1883 surveyor had followed proper surveying procedure when establishing the two corners Devendorf found or any of the other corners of the tract described in the patent issued to Rivera. The location of those two corners is not sufficient evidence to draw a conclusion that Rivera knew that the land in Lot 10 or the buildings on that tract were not conveyed by the patent.

When he established the boundaries of Tract 43, Devendorf monumented the corners with iron posts with inscribed brass caps. (Field Notes at 525-27.) We note that, of particular relevance to the present case, the monuments for the two corners (AP-2 and AP-3), which define the line running north-south between Lot 10 and Tract 43, were still in existence at the time of a corrective resurvey in 1981. Further, the situs of Tract 43 relative to the river, highway, and general topography of the area was displayed on a plat prepared in connection with the resurvey. All of this put everyone on notice of the boundaries of Tract 43 and Lot 10. BLM urges us to find that, at least since 1925, the heirs of Rivera knew that the land in Lot 10 had not been patented to Rivera in 1888, and that the Lawsons should have sought to remedy the error sooner, but did not until 1995, when they filed a patent correction application. A question of good faith on the part of the person holding the tract approximately 50 years after the homestead entry has little bearing on a question of

^{17/} The preferred method of reestablishing the boundaries of a previously surveyed tract is a dependent resurvey. A dependent resurvey has been described as a retracement and reestablishment of the lines of the original survey in their true original positions according to the best available evidence of the positions of the original corners. In legal contemplation and in fact, the lands contained in a certain section of the original survey and the lands contained in the corresponding section of the dependent resurvey are identical. Manual of Instructions for the Survey of the Public Lands of the United States (1973), at ¶ 6-4; Burlington Resources Oil and Gas Co., 150 IBLA 178, 186 (1999); John W. Yeagan, 126 IBLA 361, 362-63 (1993).

whether there was a mutual mistake at the time that patent was issued. Notwithstanding this fact, an allegation of bad faith is not supported by the record.

In 1946, Encarnacion Rivera wrote BLM, indicating a desire to amend his father's homestead entry. See 94 IBLA at 221. The record contains a copy of an April 1, 1946, letter from the Acting Assistant Commissioner, GLO, asking the Forest Service whether it would have any objection "[i]f [Encarnacion] Rivera elects to apply for the amendment of his father's homestead entry, Santa Fe [F]inal [C]ertificate No. 1257." This letter supports a finding that at least as early as 1946, Rivera's children were trying to find out how to gain title to the land in Lot 10 containing his house and other structures. As important, it also indicates that the Forest Service knew that Rivera's heirs were occupying the house on Lot 10 in 1946. There is no evidence that the Forest Service initiated any action to evict them.

The Lawsons believed that the proper course of action would be to seek title under the Color of Title Act, 43 U.S.C. § 1068 (2000), and for that reason no action was taken to seek correction of the patent. Following our decision in Ramona and Boyd Lawson, 94 IBLA at 220, the Lawsons filed their application seeking to have the patent issued to Rivera amended to include the portion of Lot 10 containing the house and other buildings.

In Foust, the applicant for patent correction acquired the land from the widow of the original entryman with no reason to know that the patented land did not encompass the entryman's original improvements. "[N]o one suspected the mistake until 1969, and the mistake could not be confirmed until an extensive resurvey in 1979." 942 F.2d at 717. Similarly, in Val Snow, we were persuaded that, at the time of patent, neither the original entryman nor the United States had any reason to know of the misdescription in the original patent. 79 IBLA at 265.

Although it has been argued that the Lawsons (and their ancestors) failed to act in a timely manner, there is also nothing in the record indicating that the Department of the Interior or the Forest Service (the surface management agency charged with managing the surface of Lot 10) took any action to terminate the occupancy of the land and improvements the Lawsons occupied in Lot 10, even though that occupancy was open, notorious, and apparently continuous. As noted in Foust, "[a]lthough adverse possession does not run against the Indians their failure to take some action against the alleged trespass for nearly forty years is a relevant consideration in evaluating the equities of the case." Foust, *supra*, at 717. Similarly, the lack of evidence of any action having been taken by the Government regarding Lot 10 for a period of more than seventy-five years is a relevant consideration.

The fact that the land is a part of a National Forest does not itself preclude correction, if the public interest sought to be advanced by the withdrawal is

considered, and the equities favor correction. Mantle Ranch Corp., 47 IBLA at 36–37, 87 I.D. at 153.^{18/} In the Foust case, the Federal court compared 43 U.S.C. § 1746 with earlier legislation and stated: “[T]he statute no longer requires the land’s availability for entry to correct a patent.” Foust, supra, at 714. In Foust, the land was not just unavailable when the application for correction was filed; it was unavailable when the original patent was issued. If an application for correction is to be rejected as a matter of equity and justice, something more than the subsequent withdrawal of the land must be shown.^{19/}

The photos and other evidence in the files clearly indicate that the land the Lawsons seek is river bottom land suitable for agriculture. In a letter to the Field Solicitor from the District Ranger, Pecos/Las Vegas Ranger District, Forest Service, dated May 1, 1997, the Forest Service stated that it was in the process of developing a management plan for the corridor of withdrawn land along the wild and scenic river segment, and was seeking to acquire non–Federally–owned land along the river. In that letter the Forest Service stated that: “Concurring with a correction of patent which would reduce [F]ederal ownership of lands along the River corridor would be contrary to this objective.” However, the Forest Service has not shown that conveyance of the land in Lot 10 would thwart its management plan in any specific way. The Lawsons seek to add approximately 12 acres to the existing patented tract, and a determination that the land they seek was the land that Rivera and the Government believed was being conveyed at the time of patent. There is no evidence that the conveyance would have any meaningful impact on the goals Congress intended to impose when it designated the Pecos River from Terrero, New Mexico, to its headwaters as a part of the National Wild and Scenic Rivers System.

^{18/} In the Mantle case the land in question was a part of the Dinosaur National Monument, but the Board found that fact insufficient to deny patent amendment.

^{19/} When we compare this case with Foust, supra, we note that the land that was to be conveyed in the Foust case was a part of the Wind River Reservation, dedicated to the Arapaho and Shoshone Indian Tribes. The Department of the Interior has a “special fiduciary responsibility to Native Americans * * * “The protection of Indian property rights is an area where the trust responsibility has its greatest force.” Aguilar v. United States, 474 F. Supp. at 846 (citations omitted).” Omar Stratman v. Leisnoi, Inc., 157 IBLA 302, 311 (2002). In cautious recognition of this special responsibility, the Board ruled against Foust in Shoshone and Arapaho Tribes, 102 IBLA 256 (1988), finding that the balance of the equities favored rejecting the correction of the patent. The Court of Appeals overruled that decision, stating that “IBLA made a clear error of judgement in finding that Foust was not entitled to relief as a matter of equity.” Foust, supra, at 718.

Balancing the interests of the parties, we find that the equities clearly fall in favor of correcting the patent to include the lands that the homesteader sought and the Government intended to convey in 1888 and which were occupied by the homesteader and his heirs for over 120 years. When balancing the need to preserve the land as a part of the National Wild and Scenic Rivers System, when it has not heretofore been preserved and when the surrounding land is, for the most part, privately owned and controlled, with the need to do what the parties intended when conveying the lands over 110 years earlier, the equities clearly fall in favor the Lawsons.

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 reversed and the case is remanded to BLM for further action in compliance with this decision.

R.W. Mullen
Administrative Judge

I concur:

Lisa Hemmer
Administrative Judge