



SELDOVIA NATIVE ASSOCIATION

173 IBLA 71

Decided November 27, 2007



United States Department of the Interior
Office of Hearings and Appeals
Interior Board of Land Appeals
801 N. Quincy St., Suite 300
Arlington, VA 22203

SELDOVIA NATIVE ASSOCIATION

IBLA 2007-11

Decided November 27, 2007

Appeal from a decision of the State Director, Alaska State Office, Bureau of Land Management, denying an application to correct a patent issued to an Alaska Native village corporation. AA-82910.

Affirmed.

1. Administrative Procedure: Adjudication--Administrative Procedure: Administrative Review

Review by the Interior Board of Land Appeals of a denial of an application to correct a patent is not limited to the grounds stated by BLM in its decision or to reasons or theories asserted in the parties' filings.

2. Federal Land Policy and Management Act of 1976: Correction of Conveyance Documents--Patents of Public Lands: Corrections--Alaska Native Claims Settlement Act: Conveyances: Interim Conveyance--Alaska Native Claims Settlement Act: Easements: Decision to Reserve--Patents of Public Lands: Reservations

Alleged improper reservation of trail access easements in violation of applicable regulations, and alleged improper expansion of easement uses in the confirmatory patent, are alleged errors of law that fall outside the Secretary's authority to correct errors of fact in patents under 43 U.S.C. § 1746 and 43 C.F.R. Subpart 1865.

APPEARANCES: Donald C. Mitchell, Esq., Anchorage, Alaska, for Seldovia Native Association; Dennis J. Hopewell, Esq., Deputy Regional Solicitor, U.S. Department of the Interior, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HEATH

This appeal is the latest phase in a controversy regarding small all-terrain vehicle (ATV) use of easements reserved in certain lands conveyed to the Seldovia Native Association (SNA), an Alaska Native village corporation, under sections 14(a) and 22(j) of the Alaska Native Claims Settlement Act of 1971 (ANCSA), 43 U.S.C. §§ 1613(a) and 1621(j) (2000). SNA appeals from a decision of the Bureau of Land Management (BLM) Alaska State Director dated August 31, 2006, rejecting SNA's application to correct Patent No. 50-93-0522 (Application) under section 316 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1746 (2000).¹ For the reasons explained below, we affirm the State Director's decision.

BACKGROUND

A. *The 1975 Interim Conveyance, the 1993 Patent, and the Reservation of the Trail Easements*

This appeal arises from the same underlying set of facts as *Seldovia Native Association*, 161 IBLA 279 (2004). The lands involved here were initially conveyed to SNA under ANCSA section 22(j) in Interim Conveyance (IC) No. 16 on October 17, 1975. IC No. 16 at unpaginated 1. IC No. 16 expressly reserved to the United States a public easement identified as a "25-foot trail easement for the existing trail from the village of Seldovia to Seldovia Lake." IC No. 16, at unpaginated 2.² Additional spur trails were reserved as 25-foot easements. *Id.*

After the lands had been surveyed, BLM issued Patent No. 50-93-0522 on September 14, 1993. The patent replaced IC No. 16 as well as six other ICs

¹ Section 316 was amended in 2003 in a manner not relevant here. 43 U.S.C.A. § 1746 (Supp. 2003).

² The reservation was included under the authority of ANCSA section 17(b)(3), Pub. L. No. 92-203, § 16, 85 Stat. 705, formerly codified at 43 U.S.C. § 1616(b)(3) (1976). Subsections (a) and (b) of that section addressed the establishment, membership, compensation, procedures, duties, and powers of the Joint Federal-State Land Use Planning Commission of Alaska and authorized the Commission to identify public easements across selected lands in Alaska. These subsections were omitted from the current edition of the United States Code pursuant to former subsection (a)(10) of that section, which provided that the Commission would cease to exist effective June 30, 1979. *See* 43 U.S.C. § 1616 (2000), Historical Note; *see also Seldovia Native Corporation*, 161 IBLA at 282 n.2; *Mendas Cha-Ag Native Corp.*, 93 IBLA 250, 254 n.3 (1986).

(Nos. 101, 139, 183, 185, 196, and 314), dating from June 20, 1978, through May 15, 1980. Patent No. 50-93-0522 at unpaginated 1. It expressly reserved to the United States the easement for the trail from the village of Seldovia to Seldovia Lake, identified as EIN 19 C5 and described as “[a]n easement twenty-five (25) feet in width for an existing access trail from the village of Seldovia in Sec. 32, T. 8 S., R. 14 W., Seward Meridian, southerly to Seldovia Lake in Sec. 2, T. 10 S., R. 14 W., Seward Meridian.” Patent No. 50-93-0522 at unpaginated 7. It further stated that “[t]he uses allowed are those listed above for a twenty-five (25) foot wide trail easement.” *Id.* The patent specified that “[t]he uses allowed on a twenty-five (25) foot wide trail easement are: travel by foot, dogsleds, animals, snowmobiles, two- and three- wheel vehicles, and small all-terrain vehicles (ATVs) (less than 3,000 lbs. gross vehicle weight (GVW)).” Patent No. 50-93-0522 at unpaginated 4. The patent also reserved 14 other 25-foot wide access trail easements, specifying the same uses, most of which were identified in one of the several ICs.

B. *SNA’s Objection to ATV Use and Its Prior Appeal*

In November 2000, SNA requested that BLM make a public announcement that ATV use would be prohibited on the 25-foot trail easement from the village of Seldovia to Seldovia Lake. According to SNA, the easements were not originally intended for ATV use. *Seldovia Native Association*, 161 IBLA at 280. BLM denied SNA’s request in a letter dated December 21, 2000. SNA appealed the BLM letter to this Board (IBLA 2001-141), leading to the 2004 decision in which we held that to the extent that the appeal challenged BLM’s 1975 IC reserving the 25-foot trail easement without excluding ATV use, the appeal was barred by administrative finality. The Board observed that SNA had not appealed the 1975 decision approving the IC or the terms of the IC within the time allowed. *Seldovia Native Association*, 161 IBLA at 285.

The Board also held in the 2004 decision that SNA was not adversely affected by BLM’s refusal to announce the prohibition that SNA requested because the trail was not cleared or improved, and was impassable to ATVs. BLM stated that it had no plans to clear the trail, so any adverse effect on SNA was contingent on some future occurrence. The Board therefore dismissed the appeal of the letter. 161 IBLA at 286-287.

C. *SNA’s Application to Correct the Patent*

On April 24, 2001, while IBLA 2001-141 was pending, SNA filed the FLPMA section 316 Application under rules implementing that provision at 43 C.F.R. Subpart 1865. SNA asserted that it had not received the patent in 1993 when it was issued and had only recently learned of its existence in discussions between its counsel and the Regional Solicitor’s Office. Letter from Donald Craig Mitchell,

counsel for SNA, to Francis R. Cherry, Jr., BLM Alaska State Director, dated April 24, 2001, at 1-2.

In the Application, SNA requested that BLM correct the patent “to eliminate all references to easements that are reserved in the patent.” In the alternative, SNA requested that the BLM amend the description of the 25-foot easement uses “to inform the public that all-terrain vehicles (ATVs) may not be operated on the easements.” Application at 1. SNA did not specify whether this request for “correction” (1) was limited to the easements reserved in IC No. 16, or (2) encompassed all the 25-foot trail easements reserved in the patent. A copy of IC No. 16 was the only IC attached to the Application, and was the only IC discussed or mentioned in the Application.

In support of its request to eliminate the reserved easements entirely, SNA alleged in the Application that the 25-foot easement reservation in IC No. 16 was ineffective because it was not specific as to the use of the easement. SNA asserted that this was contrary to the regulation in force at the time, 43 C.F.R. § 2650.4-7 (1975).³ Application at 2. In support of its alternative request to amend the description of the allowed uses of the easements in the patent to prohibit ATV use, SNA argued that when BLM gave SNA the opportunity to submit its views regarding any reservations to be included in the IC, BLM allegedly represented that 25-foot wide easements were reserved for travel by foot and snowmobile and 50-foot wide easements were reserved for ATVs. Application at 3.⁴ Therefore, in SNA’s opinion, the 25-foot easements reserved in IC No. 16 were limited to foot traffic and snowmobiles. *Id.* Thus, SNA asserts that in issuing Patent No. 50-93-0522 to replace IC No. 16, BLM “may not enlarge or diminish the uses that may be made of the easements that were reserved in the interim conveyance that the patent replaces.” Application at 4. Consequently, SNA asserted that BLM erred when it issued the

³ Paragraph (b)(1) of that regulation provided that “[a] public easement shall be reserved only if it is specific as to use and corridor location and size and both use and corridor location and size shall be reasonably related to an anticipated public use or a planned or existing governmental function.”

⁴ The source for the alleged representation is a BLM Alaska State Office brochure titled “Local Easements in Alaska: A brief explanation of easement guidelines under the Alaska Native Claims Settlement Act (Public Law 92-203)” attached as Exhibit D to SNA’s Statement of Reasons (SOR) in the instant appeal. The pamphlet bears no date, and there is nothing in the record that evidences when it was prepared or printed. One of the columns is captioned “What Are Easement Size and Width Standards?” Under “Trails” it states “25 feet for foot trails and snowmachine trails” and “50 feet for all-terrain vehicle trails.”

patent because the uses of the 25-foot easements were improperly enlarged to include small ATV use. Application at 5.

In a letter dated August 31, 2006, BLM informed SNA that the Application had been processed but BLM had decided that the reserved uses for the 25-foot easements would remain the same. Decision at 1.⁵ BLM did correct certain clerical errors in Patent No. 50-93-0522 and therefore issued a new patent, No. 50-2006-0381. *Id.* at 2. SNA does not object to any corrections in the newly-issued patent, but challenges BLM's continued reservation of the easements and retention of the provision allowing small ATV use on 25-foot-wide trails. Patent No. 50-2006-381 at 4.

D. *The Instant Appeal*

SNA timely filed its Notice of Appeal on September 19, 2006. In its SOR, SNA restates the same legal arguments presented in the Application. First, SNA claims that the IC No. 16 reservation of the 25-foot easements was void because their uses were not described as 43 C.F.R. § 2650.4-7 (1973) required. Second, in the alternative, SNA states that even if the initial reservation was not void, BLM represented to SNA that the 25-foot easements were reserved for travel only by foot and snowmobile, and based on those representations BLM could not enlarge the reservation in Patent No. 50-93-0522. SOR at 3-7.⁶

SNA makes one additional argument in the SOR, namely, that BLM's August 31, 2006, decision did not consider SNA's arguments. Because BLM provided no explanation of its reasoning, SNA argues the decision was *per se* arbitrary and capricious. SOR at 8, citing *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943). SNA suggested that the Board consider remanding the matter so that the BLM Alaska State Office could "explain its rationale for rejecting the legal arguments SNA presented in its Application to Correct Patent No. 50-93-0522." SOR at 9.

In its Answer, BLM argues that under 43 C.F.R. Subpart 1865, which implements FLPMA section 316, and specifically under the definition of "error" at 43 C.F.R. § 1865.0-5(b), BLM may correct only errors of fact in patents, not alleged errors of law. Answer at 3. According to BLM, the Application seeks to correct alleged errors of law. Answer at 4. Additionally, BLM asserts that the appeal is

⁵ While the 5-year delay between the date of the Application and the date of BLM's decision has not been completely explained, BLM did inform SNA that it would not process the Application until IBLA 2001-141 was decided. Letter from BLM, dated May 3, 2001. IBLA 2001-141 was decided on May 12, 2004. 161 IBLA 279.

⁶ The SOR makes no mention of any ICs other than No. 16 or of any other easements reserved in the patent.

barred by the doctrine of administrative finality for the same reasons articulated in *Seldovia Native Association*, 161 IBLA at 285. Answer at 5-6. Finally, BLM urges that even if the Board could reach the merits, the reservation of public access easements in 1975 and the delineation of uses in the 1993 patent were proper, incorporating by reference arguments made in its Motion to Dismiss and Answer filed in the prior Board appeal.

In its Reply, SNA first argues that because the State Director's letter does not rely on the grounds articulated in the Answer, the Answer constitutes improper *post hoc* agency reasoning on which the Board may not rely. Reply at 3, citing *National Railroad Passenger Corp. v. Boston and Maine Corp.*, 503 U.S. 407, 420 (1992), and *Motor Vehicle Manufacturers Assoc. v. State Farm Mutual*, 463 U.S. 29, 50 (1983). SNA continues by arguing that because FLPMA section 316 does not define the term "error," the statute's authorization to correct "errors" in patents should be read as having its ordinary meaning, which includes errors of law as well as errors of fact. Reply at 4-5. SNA argues that because the definition of "error" in the BLM regulations is not the ordinary meaning of the word, the regulation therefore is *ultra vires* and violates section 316. Reply at 5-8. SNA further argues that in any event, the alleged errors in the former Patent No. 50-93-0522 (now No. 50-2006-0381) are mixed questions of fact and law, asserting that part of the question is whether the Secretary, in 1975, "intended Interim Conveyance 16 to reserve twenty-five-foot-wide trail easements for travel by the public using ATVs." Reply at 8. Finally, SNA claims that IBLA 2001-141 was dismissed for lack of standing and the discussion of administrative finality was *dictum*. Reply at 9-10.

ISSUES PRESENTED

1. Does BLM's reliance on the regulations at 43 C.F.R. Subpart 1865 (in particular the definition at 43 C.F.R. § 1865.0-5(b)) as grounds for denying the Application constitute improper *post hoc* rationalization?

2. Are the alleged errors in the patent errors of law or errors of fact? If they are errors of law, does the BLM have the legal authority to correct those errors under 43 U.S.C. § 1746 and the regulations at 43 C.F.R. Subpart 1865?

DISCUSSION

I. BLM's Arguments Do Not Constitute Improper Post Hoc Rationalization

[1] SNA's argument that BLM's Answer and reasoning must be ignored because the August 31, 2006, decision did not articulate that reasoning, and SNA's reliance on such cases as *SEC v. Chenery Corp.*, *National Railroad Passenger Corp. v. Boston and Maine Corp.*, and *Motor Vehicle Manufacturers Assoc. v. State Farm Mutual*,

reflect a fundamental misunderstanding of administrative law. Those cases address the standards for judicial review of final agency action in the Federal courts under the Administrative Procedure Act (APA), 5 U.S.C. §§ 701-706 (2000). This Board is not a Federal court whose review of BLM's decision would be limited to the record before BLM, and which must either uphold or overturn BLM's action on the grounds relied on by the agency. The agency action that would be subject to judicial review under the APA and its standards of review is the final action of the Department of the Interior. Under 43 C.F.R. §§ 4.1(b)(3) and 4.21(d), the decision of this Board ordinarily will be the final action of the Department. The Board has held previously that "BLM decisions are not the 'agency decisions' as that term is used in *SEC v. Chenery Corp.*, 318 U.S. 80 (1943). The decision of this Board will be the 'agency decision'." *Robert H. Covington*, 55 IBLA 232, 234 (1981).

The Board is not limited to reasons or theories asserted in the decision under review or in the parties' filings. *See, e.g., Wyoming Outdoor Council*, 160 IBLA 387, 397-98 (2004); *United States Fish and Wildlife Service*, 72 IBLA 218, 220 (1983) (involving an appeal of the scope of use of an easement reserved under ANCSA section 17(b) across lands selected by and conveyed to an Alaska Native village corporation). The Board's decision and the record compiled before the Board in this administrative appeal will be part of the administrative record of the Department's final action. Therefore, BLM's arguments in support of its decision are not *post hoc* rationalizations.

II. *The Alleged Errors in the Patent Are Errors of Law that Are Beyond BLM's Correction Authority*

[2] Section 316 of FLPMA, 43 U.S.C. § 1746, provides in relevant part:

The Secretary may correct patents or documents of conveyance issued pursuant to section 1718 of this title or to other Acts relating to the disposal of public lands where necessary in order to eliminate errors. In addition, the Secretary may make corrections of errors in any documents of conveyance which have heretofore been issued by the Federal Government to dispose of public lands. . . .

This authority of the Secretary was delegated to BLM, which promulgated the current implementing regulations at 43 C.F.R. Subpart 1865 in 1984. In brief, sections 1865.0-1 - 1865.0-2 explain the purpose and objective of the regulations to implement FLPMA section 316's authority to correct errors in patents and other conveyance documents. Sections 1865.1-1 and 1865.1-2 prescribe the necessary process for filing, and the contents of, an application to correct errors. Section 1865.2 vests the correction authority in the authorized officer.

The regulations define “error” for purposes of these provisions 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.*

43 C.F.R. § 1865.0-5(b) (emphasis added).⁷ In *Ramona and Boyd Lawson*, 159 IBLA 184 (2003), we explained that in an application for correction,

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 [712,] 715 [(10th Cir. 1991), cert. denied sub nom., *Northern Arapaho & Shoshone Indian Tribes of Wind River Indian Reservation v. Foust*, 503 U.S. 984 (1992)]; see *Mary D. Hancock*, 150 IBLA [347,] 351-52 [(1999)]; *Frank L. Lewis*, 127 IBLA 307, 309 (1993); *George Val Snow (On Judicial Remand)*, 79 IBLA 261, 262 (1984).

159 IBLA at 190. In *Ray M. Chavarria*, 165 IBLA 161 (2005), this Board said:

[I]n a case involving what was contended to be an error of law, *Walter and Margaret Bales Mineral Trust*, 84 IBLA 29 (1984), appellant sought to have coal reservations removed from several patents. *Appellant alleged in that case that the Department had made mistakes of law in*

⁷ BLM did not explain its reasons for limiting correction of errors to factual errors either in the preamble to the proposed rule or in the preamble to the final rule. See 47 Fed. Reg. 19060 (May 3, 1982) (proposed rule) and 49 Fed. Reg. 35296 (Sept. 6, 1984) (final rule). But BLM’s intent is clear not only from the plain language of the regulation, but also from the change in the definition’s language between the proposed rule and the final rule. The proposed rule defined “error” as inclusion of erroneous descriptions, terms, conditions, etc., in a patent or document of conveyance “as a result of factual error or unintentional or inadvertent deviation from statutory or regulatory requirements.” 47 Fed. Reg. at 19062. The final rule changed this to “as a result of factual error” and specified that errors do not include mistakes of law, as quoted above. 49 Fed. Reg. at 35299.

including the reservations in the patents in question. Assuming such legal mistakes could have been shown, they would “not be correctable pursuant to section 316 of FLPMA, given the regulatory limitation” that corrections are limited to mistakes of fact and not of law. *See* 43 CFR 1865.0-5(b). 84 IBLA at 32.

165 IBLA at 182 (emphasis added). *See also* Steve H. Crooks and Era Lea Crooks, 167 IBLA 39, 44 (2005); Lloyd Schade, 116 IBLA 203, 208 (1990); Bill G. Minton, 91 IBLA 108, 111-12 (1986).

In the present case, SNA requests a correction to Patent No. 50-2006-0381 based on the alleged failure of the State Director to comply with the relevant regulation when the easements were reserved in 1975 in IC No. 16, and on the alleged improper “enlarge[ment]” in the 1993 patent of the uses of the easements reserved. The core of both arguments is that BLM supposedly exceeded its *legal* authority. SNA does not argue that anything in the patent reflects a factual error or factual misunderstanding, such as what lands were to be conveyed or whether the descriptions were accurate. Thus, the alleged errors are errors of law.

Indeed, SNA initially admitted this. In its SOR, SNA affirmatively argued:

Whether in 1975 the Alaska State Director acted lawfully when in Interim Conveyance No. 16 he reserved easements without specifying the uses for which the easements were being reserved *is a question of law*. Whether, if in 1975 he did act lawfully, the Alaska State Director intended Interim Conveyance No. 16 to reserve 25-foot-wide trail easements for travel using ATVs *is a question of law*. And if in 1975 the Alaska State Director did not so intend, whether in 1993 the Secretary violated section 22(j)(1) of ANCSA when in Patent No. 50-93-0522 he authorized small ATVs to be operated on the 25-foot-wide trail easements reserved therein *is a question of law*.

SOR at 7 (emphasis added). In its Reply, however, undoubtedly anticipating the effect of its prior admission in light of governing regulations and precedent, SNA recasts part of the alleged errors as an error of fact. SNA argues that “[w]hether in 1975 the Secretary intended Interim Conveyance 16 to reserve twenty-five-foot-wide trail easements for travel by the public using ATVs is a question of fact that focuses on the subjective intent of the Secretary.” Reply at 8.

This argument is not persuasive. The easement reservations for trail access in the IC said nothing about ATV use specifically. The question is whether some rule or legal principle would bar small ATV use on an easement reserved for purposes of trail access if such ATV use is not specifically identified in the reservation, such that the

specification of small ATV use in the 1993 patent was improper. But that is a question of law, not an alleged error of fact. Likewise, the question of whether the IC's silence as to potential ATV use contravened the former 43 C.F.R. § 2650.4-7(b)(1) (1975), because it insufficiently identified the potential uses of the easement, also is a question of law.

BLM thus was without authority to correct the alleged errors under 43 C.F.R. Subpart 1865. Therefore, its denial of the Application was correct.

Whether FLPMA section 316 grants the Secretary sufficient authority to correct alleged legal errors in patents or other documents of conveyance, should the Secretary decide to amend the current rule and provide for correction of legal errors, or whether the current rule is *ultra vires* because it did not so provide, is not for this Board to decide. The Board is bound by the duly promulgated rules of the Department and is not empowered to declare such a rule invalid. *E.g., El Monte Bindery Systems, Inc.*, 164 IBLA 243, 252 (2005); *Western Slope Carbon*, 98 IBLA 198, 201 (1987); *Doyon, Limited*, 78 IBLA 327, 329 n.1 (1984).⁸

Finally, we disagree with BLM's suggestion that this appeal is barred by the doctrine of administrative finality. The appeal before us is from a decision denying SNA's FLPMA application for patent correction. FLPMA section 316's authority to correct patents is independent of any prior administrative appeal (or lack thereof) regarding errors in provisions of a proposed or draft conveyance or patent. BLM's action on the patent correction application has not been considered before. SNA's appeal from that action is timely and we clearly have jurisdiction to consider it.

BLM's concern appears to be a perception that SNA is using the patent correction procedures as an avenue to avoid the consequences of failing to timely raise challenges to the easement reservations in the 1975 IC or the easement use language in the 1993 patent that should have been raised many years ago. If the Subpart 1865 rules provided for correction of errors of law, nothing would prohibit SNA from seeking corrections notwithstanding its earlier failure to appeal. The situation here thus is different from the prior case (IBLA 2001-141), in which SNA's appeal from BLM's refusal to issue a public notice forbidding small ATV use was an attempt to avoid the consequences of having not appealed the reservation of easements in the 1975 IC or the easement use language included in the 1993 patent.

⁸ This case does not present one of the rare exceptions in which we are "faced with a codified regulation which: (1) was improperly promulgated; (2) lacks any statutory support; and (3) has been consistently ignored by the Department in actual practice." *Garland Coal Co.*, 52 IBLA 60, 72, 88 I.D. 24, 30 (1981).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decision appealed from is affirmed.

_____/s/_____
Geoffrey Heath
Administrative Judge

I concur:

_____/s/_____
Lisa Hemmer
Administrative Judge