



GORDMAN LEVERICH L.L.P.

177 IBLA 52

Decided April 6, 2009



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

GORDMAN LEVERICH L.L.P.

IBLA 2008-190

Decided April 6, 2009

Appeal from a decision of the Colorado State Office, Bureau of Land Management, rejecting an application to correct patent. CO-923.

Affirmed.

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

Under section 316 of FLPMA, 43 U.S.C. § 1746 (2000), the Secretary may correct errors in any documents of conveyance issued to dispose of public lands. Errors in patents are defined 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. Errors in patent are limited to mistakes of fact and not of law.

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

To show entitlement to a patent correction under section 316 of FLPMA, an applicant must show by a preponderance of evidence that there was an error of fact that requires correction and that considerations of equity and justice favor such correction.

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

Equity and justice do not compel the correction of patents issued almost 100 years ago, even where a mistake of fact

is shown, when appellant, a remote successor in interest, had no reason to believe it was acquiring more land than it had bargained for; when it is shown that appellant easily could have ascertained the boundaries of its land and elected not to do so, despite specific disclaimers stated in its purchase contract and title insurance; when only traces of one of the original entrymen's homesteads remain and there is no evidence or suggestion that the purchase price was based on the presence or added value of such remnants; when appellant neither paid taxes on the land sought, nor substantially invested in the entrymen's improvements; and when it is shown that the entrymen's patents in fact embraced more acreage than described in their applications.

APPEARANCES: Joanne Herlihy, Esq., Denver, Colorado, for appellant; Tyson H. Powell, Esq., U.S. Department of the Interior, Office of the Regional Solicitor, Lakewood, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE PRICE

The Gordman Leverich Limited Liability Partnership (Partnership) has appealed from a decision of the Colorado State Office, Bureau of Land Management (BLM), dated May 2, 2008, rejecting its application to correct patent, serialized as CO-923, filed pursuant to section 316 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1746 (2000).¹

The Partnership seeks a wedge-shaped, 146.9-acre parcel in the White River National Forest (NF) located in the NE $\frac{1}{4}$ NW $\frac{1}{4}$ and NE $\frac{1}{4}$ of sec. 19, T. 7 S., R. 93 W., Sixth Principal Meridian (6th PM), in Garfield County, Colorado. The Partnership contends that the parcel is the land that its predecessors-in-interest intended to enter

¹ The May 2, 2008, decision was issued in response to the Partnership's letter of Dec. 22, 2004. Though it is not captioned as a decision and the body of the letter does not state that it is a decision or include the standard appeals/stay petition language, the letter declared that "it is not appropriate to approve The Partnership request." Decision at 3. In addition, the letter concluded that proceeding under the Color of Title Act, 43 U.S.C. §§ 1068-1068b (2000), had been considered and rejected as inapplicable. *Id.* A "decision" adjudicates the rights of the parties in a given factual context. *Blackwood and Nichols*, 139 IBLA 227, 229 (1997); *see also Joe Trow*, 119 IBLA 388, 392 (1991), and cases cited. Accordingly, the letter constitutes an appealable decision. 43 C.F.R. § 4.410(a); *see Geo-Energy Partners - 1983 Ltd.*, 170 IBLA 99, 119 (2006).

and describe in their homestead applications, as shown by evidence of original homestead improvements and the official plat of that township. The Partnership acquired title in 1998. In support of its appeal, the Partnership has submitted a notebook containing the research and investigation, including numerous maps and exhibits, prepared or assembled by Wyman Bontrager, a Land Surveyor for the NF (Bontrager Report).

Background

In 1882, Deputy Surveyors Fowler and Fahringer surveyed the east boundary of T. 7 S., R. 93 W., 6th PM. In 1883, Deputy Surveyor Benjamin Clark surveyed the north Township boundary, and in 1886, he surveyed the west Township boundary. In the course of the latter survey, Clark established the corner common to secs. 13 and 24, T. 7 S., R. 94 W., 6th PM, and secs. 18 and 19, in R. 93 W., or what BLM refers to as the southwest “controlling point” on the longest side of the parcel. Answer at Ex. A; Bontrager Report, Title Claim Report at 9. In 1891, Deputy Surveyor George House surveyed the south boundary of the Township. In 1892, he subdivided T. 7 S., R. 93 W., setting the corner common to secs. 17, 18, 19 and 20, T. 7 S., R. 93 W., 6th PM (or what BLM refers to as the northeast controlling point on the longest side of the parcel). *Id.* House reported that he had retraced the east range line (which coincides with Clark’s line for the west boundary of T. 7 S.) and recovered all the corners on the south 3½ miles. He further reported that he found no original corners in the north 2½ miles and re-established corners at regular intervals. House’s 1893 survey plat depicted the east-west (latitudinal) lines as bearing due east, thus depicting sec. 18 as generally square in shape. Statement of Reasons (SOR) at 7; Bontrager Report, Maps Tab, Ex. D.

In 1908, Herbert B. Swartz applied for a homestead entry, describing the land he sought as “the W½SE¼, the NE¼SE¼, and the SE¼NE¼” of sec. 18, T. 7 S., R. 93 W., 6th PM. Bontrager Report, Homestead 0180 File Tab. Swartz identified the south property line of the described land by projecting a line east from the southwest controlling point (at the Township corner common to secs. 13 and 24, T. 7 S., R. 94 W., 6th PM, and secs. 18 and 19, in R. 93 W.) rendering a squared parcel. Answer at 2, Ex. A. Evidence in the record confirms that Swartz lived on the disputed property and used the land for ranching and grazing operations, cultivating up to 25 acres of potatoes, wheat, oats, field peas, timothy, and alfalfa. SOR at 2-3, citing Bontrager Report, Homestead File 0180 Tab, Exs. A-H. Witnesses attested that Swartz made improvements to the property, including a home, barn, stable, henhouse, and two corrals. He also fenced the entire parcel. *Id.* at Exs. E and F. He was subsequently granted a patent on April 14, 1914, for the land he had described in his application.

In 1911, Alonzo Adams, a transitman in the Office of the U.S. Surveyor General, was assigned to retrace and re-establish the east boundary of T. 7 S., R. 94 W. (which coincides with the west boundary of T. 7 S., R. 93 W. and is the range line between Rs. 93 and 94 W.). In a letter to the Supervisor of Surveys, Denver, Colorado, dated September 14, 1911, Adams reported that the east boundary of sec. 1, T. 7 S., R. 94 W. (along the west boundary of sec. 6, T. 7 S., R. 93 W.), was 45 chains in length, while the west boundary of sec. 1, T. 7 S., R. 94 W., appeared to be the full 80 chains in length. In addition, he reported “descriptions of two different stones set for the SE cor. of the Tp., without explanation.” Bontrager Report, Letters Survey Group Tab, Ex. A.

By letter dated September 16, 1911, Surveyor General Timothy O’Connor replied by providing the descriptions contained in Clark’s 1886 survey field notes and House’s 1891 field note description for the common corner between Ts. 7 and 8 S., Rs. 93 and 94 W., which confirmed the discrepancies Adams had noted. However, O’Connor admonished Adams that his Special Instructions directed him to retrace and re-establish only “the necessary initial and closing lines of T. 7 S., R. 94 W., etc.” Bontrager Report, Letters Survey Group Tab, Ex. B at 3 (original emphasis).

In further correspondence from Adams to Frank Johnson, Supervisor of Surveys, Denver, Colorado, dated October 1, 1911, Adams provided a rough diagram of the situation as he had found it, stating that

the corners found, which were all in fairly good condition, are not in the positions stated in the field notes, and do not conform to the subdivision of the Tp. E. of the line as I find it on the bdrs. of sec. 6 [T. 7 S., R. 93 W., 6th PM]. The official plat at the land office show[s] the Harris and Galloway claims as contiguous, while on the ground the difference is as shown: Mssrs Gant, (Anderson) and Galloway having located their lands according to the existing subdivisional corners and the reported positions of corners on the range line; while the others, after careful surveys have been unable to find any subdivisional corners, and have located their claims from the existing corners on the range line; being assured by the County Surveyor and others that these were correct, and would fully serve to define their claims. They have occupied and improved the claims in the belief that they would be protected in the possession of the lands so located.

I found no corners on the range line south of the $\frac{1}{4}$ sec. cor. bet. secs. 19 and 24, and believe that quite an elaborate retracement will possibly be necessary in order to locate the Tp. cor.

SOR at 3, citing Bontrager Report, 1911 Correspondence Tab, Ex. C at 1-2.

In his reply to Adams dated October 7, 1911, Johnson stated:

. . . Your investigations have developed the fact that all of these corners north of, and including, the quarter corner between sections 19 and 24, have been found by you with the exception of Cor. Secs. 13, 18, 19 and 24.^[2] The locus of the range line north of the quarter corner between 19 and 24 is therefore fixed As I understand your letter the corners of the subdivisional surveys in the surveyed portion of T. 7 S., R. 94 W., are in harmony with those of the east boundary of the township, while those subdivisional corners east of the range line [between Rs. 93 and 94 W.] are not in harmony with the range line corners as they are found to exist; and that locations east of this boundary have been made in the case of Gant and Galloway with reference to the interior corners of T. 7 S., R. 93 W., while the claims of Harris, Schwartz [sic] and others have been made (in the absence of subdivisional corners in their vicinity) with reference to the theoretical position of corners on the range line.

Bontrager Report, 1911 Correspondence Tab, Ex. D. at 1-2 (original emphasis).

In 1915, George Edgar Swartz applied for a homestead entry on Lot 4, SE $\frac{1}{4}$ SW $\frac{1}{4}$, NE $\frac{1}{4}$ SW $\frac{1}{4}$, and SE $\frac{1}{4}$ NW $\frac{1}{4}$, sec. 18, T. 7 S., R. 93 W., 6th PM, on land adjoining Herbert's homestead entry.³ On March 3, 1917, he received Patent No. 57064 for the lands described in his application. Bontrager Report, Patents and Case Law Tab.

It was not until many years later that BLM determined to take any action with respect to the situation discovered by Adams. On March 17, 1947, the Utah-Colorado Region of BLM's Survey Office (Utah-Colorado Region) issued Special Instructions for a field examination of T. 7 S., R. 93 W., and an extension survey in T. 7 S., R. 94 W., 6th PM, under Group 368 - Colorado. Bontrager Report, 1947 Correspondence Tab, Ex. A. BLM was divided over how best to resolve the problems Adams had discovered. After a preliminary retracement, the engineers in the Utah-Colorado

² Sections 13 and 24 are in T. 7 S., R. 94 W., and adjoin secs. 18 and 19, T. 7 S., R. 93 W., 6th PM.

³ BLM's decision described the type of entry as a "CE" or cash entry, but the Serial Register Page notes that George E. Swartz sought a homestead entry. Administrative Record (AR), Serial Register Page Tab. According to a note to the file by George Allen dated May 10, 2004, he searched the chain of title back to 1937. At some point a Claude Corley acquired title to the lands formerly owned by the Swartzes. Corley sold to Helen and Lee Gaines Rinehart on June 22, 1954. AR, Chain of Title Tab.

Region concluded that the surveys performed by Clark, Fowler and Fahringer, and House were “grossly unrelated,” due to gross error or fraud attributable to House’s fictitious closings of his subdivisional lines on Clark’s north and west Township boundaries. Indeed, the Utah-Colorado Region suspected that House may have independently established his own north and west boundaries without reporting them. Bontrager Report, 1947 Correspondence Tab, Ex. A at 3. The Utah-Colorado Region found that all the entries within the Township had employed House’s subdivision and north and east boundary controls, except those in secs. 7, 8, 18, 19, 31, and 32, which had used the west Township boundary controls established by Clark and the south Township boundary controls established by House, and that there was considerable vacant public land between the groups of claims relying on the two sets of unrelated controls. *Id.*, Supplemental Instructions dated July 14, 1947, 1947 Correspondence Tab, Ex. F at 2. The Utah-Colorado Region advocated a combination of dependent and independent resurveys to reconcile and properly close lines affecting secs. 7, 8, 18, 19, 31, and 32.

However, the BLM Director was of the view that the corners of original surveys could not in any circumstance be ignored, and that bona fide rights would be best protected by recognizing such recovered corners, even if relying on all of them produced oddly-configured sections. He directed the Utah-Colorado Region to execute a dependent resurvey, in the course of which, among others, House’s 1892 section and quarter-section corners along the 5th meridional line between secs. 7 and 8, 17 and 18, and 19 and 20, except the quarter-section corner between secs. 17 and 18, T. 7 S., R. 93 W., 6th PM, were recovered. The corner common to secs. 17, 18, 19, and 20 lay further north than where it would have been had it been directly east of the corner common to secs. 13, 18, 19, and 24 on the Township boundary, thus confirming on the ground that secs. 7, 18, 19, and 30 are parallelograms in shape. *See* 1947 Correspondence Tab, Exs. G, J, and K; 1948 Correspondence Tab, Exs. A, B, D, and E; Maps Tab, Ex. G (plat of 1948 dependent resurvey, accepted 1949). *See also* n.11 *post*.⁴

The legal descriptions in the Swartzes’ patents were unchanged; on the ground, however, the boundaries of sec. 18 as re-established by the dependent resurvey in the shape of a parallelogram actually increased the acreage embraced by those land descriptions. Herbert’s on-the-ground acreage increased from 160 to 171.82 acres, and George’s acreage increased from 159.9 to 172.47 acres. The land that is the subject of the patent correction application is a parcel generally in the shape of a right triangle with its hypotenuse running southwest to northeast, so that is in the northernmost part of sec. 19 (as depicted in the 1949 plat of the dependent resurvey). As depicted in the 1893 plat of survey, the hypotenuse was part of sec. 18.

⁴ In any event, the adequacy of the dependent resurvey is not before us. *Arthur Warren Jones*, 97 IBLA 253, 258 (1987).

On April 22, 1957, the Rineharts purchased Lot 5, SE $\frac{1}{4}$ SE $\frac{1}{4}$ sec. 18 in T. 7 S., R. 93 W., 6th PM, Patent No. 1170466.⁵

On December 22, 2004, the Partnership filed its application to correct patent, seeking the 146.49-acre parcel of NF land in sec. 19. Bontrager Report, Maps Tab, Exs. C, J.⁶

Meanwhile, in December 2007, in an adverse possession action brought in Colorado State District Court, *Beaver Creek Ranch, LP v. Gordman Leverich Limited Liability Partnership*, Case No. G 04 CV 289, Garfield County, Colorado (Dec. 24, 2007), the Partnership lost 167.3 acres of disputed land to its private neighbor to the north. Answer, Ex. B. In its decision, the court found that a fence line, erected in the early 1900s to delineate the northern boundary of some of the patents at issue, had “follow[ed] the original deed boundary as it existed before the BLM moved the boundary [in the 1949 dependent resurvey].” *Id.* at 3. Although the fence had not been moved, the court concluded that as a result of the dependent resurvey, “[c]ompared to the legal boundaries set by the original survey, the [existence of the] fence line shifted possession and control of the land in both directions” *Id.*

In its May 2, 2008 decision, BLM acknowledged that “[s]urveys associated with T. 7 S., R. 93 W., have been a problem from the beginning,” but concluded that the original entrymen located their homesteads “without proper recognition of the

⁵ In 1949, the Rineharts had acquired Lots 2 (SW $\frac{1}{4}$ NW $\frac{1}{4}$) and 3 (NW $\frac{1}{4}$ SW $\frac{1}{4}$) of sec. 18, T. 7 S., R. 93 W., from the heirs of Richard F. Fogarty, the original homestead patentee (Patent No. 364254 issued Nov. 7, 1913). AR, Chain of Title Tab. With the 1954 purchase from Corley and their 1957 patent, the Rineharts owned all the lands ultimately conveyed to the Partnership by warranty deed dated June 23, 1998. *See* n.2 *ante*. The Rineharts apparently never questioned the correctness of the patents issued to their predecessors, and Lot 5 remained in Federal ownership until they purchased it.

⁶ In support of its application, the Partnership submitted a letter dated Oct. 10, 2004, from Don G. Carroll, the Acting Forest Supervisor, White River NF, to John Case, Esq., who filed the application to correct patent on appellant’s behalf. That letter states Carroll’s understanding that a corrected patent would contain the same reservation of the mineral estate contained in the Rinehart’s patent to Lot 5, and further states that a conveyance of the land in sec. 19 would not be counter to the Forest Land Management Plan or have any “meaningful impact on the goals that Congress intended to impose when it designated the boundaries of the White River [NF].” SOR, Ex. A. However, the absence of an objection by the surface managing agency does not become relevant until an applicant has shown that correction of a patent is warranted.

1893 House corners along the 5th meridional section line, project[ing] their entry boundaries due east from the common corners along the range line.” BLM Decision at 2. BLM determined that House’s original section corners and quarter-section corners defined the lands described in the Swartzes’ entry applications and patents, those corners had been recovered in the 1949 resurvey, and thus the position of the sections on the ground had never changed. In addition, BLM further determined that the plat of the dependent resurvey controlled the land description contained in the 1957 Rinehart patent. Moreover, because the 1949 resurvey had increased the land included within the lands described in the Swartzes’ patents, BLM concluded that “[t]he patentees and their successors in title cannot complain of any loss of acreage, albeit that some of it may not be the land they thought they had entered.” *Id.* at 4.

Finally, BLM stated that

[a]s the lands have not been available for entry because of being within the National Forest since 1892, amendment of patent is not a viable approach. Even if circumstances allowed an amendment, the present owner of the land described in the two entries would be expected to return to the public domain those portions of the original entries outside the land to which an amendment would apply Disturbance of the 1949 resurvey should be avoided entirely as it could have unknown ripple effects

Id. at 5.

Analysis

[1] Under section 316 of FLPMA, “[t]he 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.” 43 U.S.C. § 1746 (2000). That authority is discretionary. 43 C.F.R. § 1865.0-1. By regulation, *errors in patents* consist of:

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). Accordingly, the Secretary is empowered to “correct patents which contain an erroneous description of the patented land such that the description

does not match the land the patentee either originally applied for or entered or intended to enter on the ground.” *Arthur Warren Jones*, 97 IBLA at 254.

More specifically, it is established that FLPMA’s authorization extends to errors that result in a party receiving title to the wrong lands. The authority may be exercised where a homestead patent omits lands that the entryman entered and which served as the basis for his homestead, provided that concerned administrative agencies do not object, the Government’s interests are not unduly prejudiced, no third party’s rights are affected, and substantial equities of the applicant will be preserved by the action. *See generally Ray M. Chavarria*, 165 IBLA 161, 181 (2005); *Mantle Ranch Corp.*, 47 IBLA 17, 36-37, 87 I.D. 143, 153 (1980).

[2] To show entitlement to correction of a conveyance document under 43 U.S.C. § 1746 (2000), an applicant must show by a preponderance of evidence both that there was an error of fact that requires correction, and that considerations of equity and justice favor such correction. *Frank L. Lewis*, 127 IBLA 307, 310-11 (1993); *George Val Snow (On Judicial Remand)*, 79 IBLA 261, 262 (1984).⁷ Without a clear showing of error, the Secretary is not empowered to exercise his statutory discretion to favor or disfavor the application. *George Val Snow (On Judicial Remand)*, 79 IBLA at 262.

In the present case, the Partnership argues that the entrymen set their boundaries from the Clark range line corners projecting east because, even after

⁷ Earlier, in *George Val Snow*, 46 IBLA 101 (1980), the Board had affirmed a BLM decision denying Snow’s application to correct patent. Noting that most of the records of the homestead entry and patent had been archived or were believed to be lost, the Board held that Snow had shown “a series of transactions by people who were purchasing described land, and who had no demonstrable right to acquire anything else that might have been earned by [the homestead patentee,] Peter Madsen. The land which was patented, and presumably described in the successive deeds to Gleave, Savage, and Snow, was surveyed and readily identifiable.” *Id.* at 103. Snow appealed in Federal district court, where the matter was remanded for a hearing when, still lacking the underlying documentation, the court was unable to reach a conclusion. Eventually the homestead records were located. In *George Val Snow (On Judicial Remand)*, 79 IBLA 261, those recovered records, coupled with the evidence adduced at the hearing, provided the basis for vacating *George Val Snow* and reversing BLM’s decision to deny the application.

hiring private surveyors and careful search,⁸ they could not find House's 1893 subdivision corners. SOR at 13. The Partnership avers that

as of 1911 knowing where and how the entrymen were locating, the BLM took no action to dissuade the entrymen's locations and, in fact, issued patents to them. Thus, if the 1893 subdivisional corners were actually located as depicted in the later 1949 resurvey, the entrymen did not know they were locating incorrectly in Section 19

Id. Further, the Partnership contends that the entrymen set their boundaries consistent with House's 1893 plat, which "depicts the latitudinal section lines bearing nearly due east of the range line corners and shows that Section 18 was a typical rectangle shape." *Id.*, citing Bontrager Report at 22, Ex. D.

There appears to be no question that the subject patents conveyed the lands described by the patentees in their applications.⁹ The Partnership instead argues that its predecessors "in good faith and bona fide [sic] thought they were locating correctly, and correctly describing the lands they located." SOR at 12. According to the Partnership, mistakes of fact occurred when lands they actually occupied and improved were excluded from their patents. *Id.* In support, the Partnership points to the northeast corner of the claimed parcel in sec. 19, on which evidence of an original homestead, consisting of the remains of a log cabin and stable, fencing, and evidence of crop cultivation, can be found. SOR at 14; Bontrager Report, Title Chain Report Tab at 6.¹⁰

⁸ The Partnership relies on Adams' Oct. 1, 1911, letter to Johnson, in which he stated that the entrymen in the area "after careful surveys have been unable to find any subdivisional corners . . . ," to conclude that they actually engaged surveyors. Adams' statement is ambiguous and could mean only that the entrymen attempted a diligent search for the subdivision monuments in the area. In any event, nothing in the record confirms that the original entrymen employed surveyors before fencing along the line they took to be their south boundary.

⁹ The parties did not provide a copy of the application underlying the Rinehart patent.

¹⁰ We note that this physical evidence of an original homestead appears to pertain only to Herbert B. Swartz's homestead entry. *Compare* Bontrager Report, Homestead 0180 File, Exs. E, F (Testimony of Witnesses), and G (Testimony of Claimant). The Rineharts purchased their patent to Lot 5 pursuant to provisions of the Mineral Leasing Act of 1920 that authorized disposition of the surface of lands open to mineral leasing, with a reservation of the mineral estate, which have since been repealed. *Id.*, Patents and Case Law Tab, Ex. F. If the Partnership relies on the stock

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Evidence in the record shows that the General Land Office (GLO) surveyors recognized that a high mountain mesa prevented the entrymen from visually ascertaining their boundary lines by reference to the alignment of boundary fences in the eastern portion of the Township. Bontrager Report, 1947 Correspondence Tab, Ex. D (Report from GLO Cadastral Engineers Petersen and Wayne to Administrative Cadastral Engineer, dated July 8, 1947, at 2). The Partnership suggests that Herbert Swartz may have relied upon the official House plat in projecting his south boundary, a suggestion that is not verified in the record. See SOR at 13; Reply at 4. While it is true that the plat of House's Township survey was officially accepted and posted in 1893, and that it depicted more or less regular sections of 80 acres throughout T. 7 S., R. 93 W. (*id.*, Maps Tab, Ex. D), when a survey plat conflicts with actual conditions on the ground, the latter controls.¹¹ *Roland Oswald*, 35 IBLA 79, 84 n.4 (1978). This is so, "even though the official survey plat may not show the tract as it is located on the ground, or the patent description may be in error as to course or distance or quantity of land stated to be conveyed." *United States v. Heyser*, 75 I.D. 14, 18 (1968). We nonetheless properly may infer that an error was made because a homestead entryman would not apply for certain lands and then expend his time and labor on different lands constructing the improvements necessary to earn patent. *Mary D. Hancock*, 150 IBLA 347, 351-52 (1999). Accordingly, the record establishes an error of fact.¹²

¹⁰ (...continued)

tanks shown on its Ex. J (*id.*, Maps Tab) to support its arguments, it has not adequately identified the specific circumstances surrounding the entry associated with each tank or shown when they were installed or by whom.

¹¹ Once an original survey of public lands is accepted by the Director of BLM, the official survey creates boundaries rather than merely ascertaining them. *1947 Manual of Surveying Instructions*, sec. 563 at 398. More particularly, [t]he subdivisions are based upon and are defined by the monuments and other evidences of the controlling official survey, and so long as these evidences are in existence the record of the survey is an official exhibit and presumably correctly represents the actual field conditions. *If there are discrepancies the record must give way to the evidence of the corners in place.*

Id., sec. 564 at 398 (emphasis added). See also sec. 8 at 7; sec. 134 at 134, ¶ 4; sec. 237 at 237; sec. 363 at 362.

¹² We reject the suggestion that only a "mutual" mistake by both the patentee and the Government will justify correction of a patent. See Answer at 4. We find no such requirement in the governing statute or regulation. As we acknowledged in *Mary D. Hancock*, 140 IBLA at 352 n.7, it is possible that a unilateral mistake of fact could also be grounds for correction. For example, we recognized the patentee's unilateral

(continued...)

Having established an error, the Partnership next must show that equity and justice favor the allowance of its application. The Board has explained the kinds of circumstances that affect our consideration of that question:

Where the applicant is the original patentee, he clearly would be justified in his expectation that the Secretary would amend the error in his patent and allow him the specific land which he had earned entitlement to through his compliance with the particular statute under which the conveyance was made. Others in close privity with the original patentee, such as the immediate heirs of a deceased entryman who were born on and continue to reside on and use the family homestead have a clear equitable interest in what the patentee actually earned by his compliance with the requirements of the law. See *Mantle Ranch Corp.*, 47 IBLA 17, 87 I.D. 143 (1980).

Where, however, the land described by the patent has been conveyed repeatedly by deed or inheritance over the course of several decades, and there is no discernable relationship or privity between the patentee and the most recent purchaser of the patented land, there is no apparent reason for the amendment of the patent.

George Val Snow (On Judicial Remand), 79 IBLA at 262. In sum, the issue before us is whether the Partnership should receive title to land the Swartzes earned instead of the land the Partnership and its predecessors actually purchased. *Id.*

In *George Val Snow (On Judicial Remand)*, the Board acknowledged the possibility, as it had in *George Val Snow*, that “even a remote transferee who, in good faith and in the exercise of reasonable diligence, had invested substantially in improving the property, or had paid a purchase price based on the value of the improvements in place, could show that he was deserving of relief.” *Id.* at 263 (quoting from *George Val Snow*, 46 IBLA at 104). The Partnership argues that since 1998, it has “spent thousands of dollars to make significant improvements to the land, including the spring” which it “revitalized . . . encasing and capping [it] as well as installing underground piping from that spring to stock tanks which the Partnership also installed.” Reply at 5, Ex. E (photographs of spring and stock watering tanks). BLM counters that “in October 2005, [t]here [was] little vestige of cultivation or improvements remaining” Response at 10, quoting BLM’s Analysis of Request for Amendment of Patents at 2. The Partnership does not dispute BLM’s characterization, and photographs in the record appear to confirm BLM’s assessment.

¹² (...continued)

mistake of fact in *Mantle Ranch Corp.*, 47 IBLA at 17.

There is no evidence that the price the Partnership paid for the land was based upon any special value attributable to the remnant of the improvements found on the parcel it seeks. The Partnership has not submitted any documentation of its expenditures, and the photographs of the spring and stock tanks do not alone persuade us that it has invested *substantially* to improve the property. Nor has the Partnership paid any taxes on the additional Federal acreage it seeks. This is therefore clearly not a case presenting the equities considered in *Foust v. Lujan*, 942 F.2d 712, 717 (10th Cir. 1991) (the immediate successor to the original patentee had made his home on the land sought for 28 years, paid the taxes, maintained the property, had made further improvements, and clearly would suffer severe economic hardship if he lost his home), *Ramona & Boyd Lawson*, 159 IBLA 84 (2003) (heirs and descendants of entryman had continuously lived on and substantially improved the homestead for 120 years), *Mary D. Hancock*, 150 IBLA 347 (purchasers and immediate successors to patentee failed to survey land and continued to place improvements in the area containing the homestead improvements), or *Mantle Ranch Corp.*, 47 IBLA 17, 87 I.D. 143 (patentee's land had been occupied and claimed for 60 years, the applicant entity represented the wife and immediate heirs of the patentee, and such heirs still resided on the land).

Moreover, the Partnership's 1998 deed expressly disclaimed any warranty that any fence lines were correctly located on boundary lines and cautioned the Partnership to inspect for discrepancies. Leverich did not inspect the property or otherwise ascertain the true situation, even though the partnership's title insurance excluded boundary conflicts that would be disclosed by a survey. See ¶¶ 22, 23, Ex. B to SOR (*Beaver Creek Ranch, LP v. Gordman Leverich Limited Liability Partnership*, No. G 04 CV 289, Judgment of Garfield County District Court dated Dec. 21, 2007). In *Arthur Warren Jones*, 97 IBLA 253, a disclaimer in the purchase contract describing the disputed house as situated on BLM-administered lands and the lack of any substantial improvements of the land following the transfer did not create equities that favored granting Jones' application. We see no reason why a different result is required here.

The Partnership suggests that the act of issuing patents to the Partnership's predecessors properly should tip the balance of equities in its favor, arguing that

as of 1911, the BLM was fully aware of where and how the entrymen were locating their claims and that those claims might be subject to material injury based on incorrect locations . . . [and because it] . . . did nothing to advise them of incorrect entry or ever took action to eject them from those lands, but rather issued them patents, it is inequitable and unjust for the BLM to deny the corrections now requested to those patents.

SOR at 16-17. This argument would carry more weight if raised by a patentee or a family member who improved and occupied the land. It is not persuasive when the west boundary of the Township, including Clark's position for the corner of secs. 13 and 24, T. 7 S., R. 94 W., and secs. 18 and 19, T. 7 S., R. 93 W. (what BLM refers to as the southwest controlling point), is not challenged, and several of House's subdivision corners were recovered in the 1949 dependent resurvey, including his position for the corner of secs. 17, 18, 19, and 20, T. 7 S., R. 93 W., 6th PM (what BLM refers to as the northeast controlling point). These recovered corners determined the position of the line between secs. 18 and 19, so that as placed on the ground, most of the westernmost tier of sections in the Township in fact are shaped like parallelograms and were so shown on the 1949 plat of the dependent resurvey approved almost 40 years before the Partnership acquired the land.¹³

The Partnership owns the lands containing evidence of having been cultivated, but it nonetheless seeks additional acreage on the basis of the presence of a spring, two stock ponds, and the remains of Herbert Swartz's homestead in the far northeast corner of the parcel, just beyond the southeast corner of the Partnership's south boundary. Those ruins clearly occupy less than the 11.82 additional acres in Herbert's patent confirmed by the dependent resurvey, while the remaining 134 acres or so of Federal land contain only five stock ponds. *See Bontrager Report, Maps Tab, Ex. J.* Where, as here, the applicant has no equitable stake in the homestead applicant's efforts to earn his patent and has no equitable interest in the land sought, but is only the most recent of a succession of purchasers of the patented land over a period of many decades, we agree with BLM that the Partnership has in fact benefitted from the 1948 dependent resurvey, which confirmed that the parcels on the ground contained more acreage than the 160 acres the Swartzes expected. The Partnership therefore received exactly what it expected to purchase: neither justice

¹³ Herbert Swartz applied for lands he described as $W\frac{1}{2}SE\frac{1}{4}$, $NE\frac{1}{4}SE\frac{1}{4}$, and $SE\frac{1}{4}NE\frac{1}{4}$ sec. 18, T. 7 S., R. 93 W., 6th PM, comprising 160 acres. Although he undoubtedly intended to claim the lands that included his original improvements, it is a fact that he used and occupied the improvements he placed in sec. 19, undisturbed, for as long as he owned his land, and he also received patent to the lands he had described in his application, except that as located on the ground, the description included 171.82 acres, only narrowly excluding the site of the cabin and stables. Similarly, George E. Swartz applied for lands he described as Lot 4, $SE\frac{1}{4}SW\frac{1}{4}$, $NE\frac{1}{4}SW\frac{1}{4}$, and $SE\frac{1}{4}NW\frac{1}{4}$, sec. 18, T. 7 S., R. 93 W., 6th PM, and, assuming any of the stock tanks were his improvements rather than Herbert's, the Rineharts' or the Partnership's, he too freely used Federal land while he retained title to the homestead lands and likewise received the lands he described in his patent, except that as located on the ground, the description actually embraced 172.47 acres. The original patentees thus were not treated unjustly.

nor equity favors those had no reason to believe they were acquiring more land than that for which they bargained. *Arthur Warren Jones*, 97 IBLA at 258.

Because the Swartz patents each described 160 acres, the maximum allowed for a homestead entry, correction of the patent in the manner sought by the Partnership ordinarily would require it to reconvey to the United States comparable acreage from the north portions of the Swartz lands. Decision at 3. It appears that this would not be possible, given the judgment in *Beaver Creek Ranch, LP v. Goldman Leverich Limited Liability Partnership*. We find no error in BLM's conclusion that correcting the patent would not be in the public interest.

[3] Although a mistake of fact has been shown, equity and justice do not compel the correction of the patents issued almost 100 years ago when the Partnership, a remote successor in interest, had no reason to believe it was acquiring more land than it had bargained for; when it easily might have ascertained the boundaries of its land and elected not to do so, despite the specific disclaimers stated in its purchase contract and its title insurance; when only traces of the original entryman's homestead remain and there is no evidence or suggestion that the purchase price was based on the presence or added value of such remnants; when the Partnership neither paid taxes on the land sought, nor substantially invested in the entrymen's improvements; and when it is shown that the entrymen's patents in fact embraced more acreage than described in their applications. BLM properly rejected the Partnership's application to correct the patent.¹⁴

To the extent not specifically addressed herein, the Partnership's arguments have been considered and rejected.

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/
T. Britt Price
Administrative Judge

¹⁴ In the absence of compelling considerations of equity and justice in this case, there is no need to reach BLM's additional finding that the application cannot be granted because the lands requested to cure the error are not now and have never been open to entry.

I concur:

_____/s/_____
Geoffrey Heath
Administrative Judge