

SOUTHERN PACIFIC RAILROAD COMPANY

IBLA 73-197

Decided July 31, 1974

Appeal from a decision of the California State Office, BLM, requiring payment of survey and patent fees, LA 0135477.

Affirmed in part; vacated in part and remanded.

Railroad Grant Lands: Mineral Lands

Where, at the time of issuance of patent to a railroad for lands within the limits of a legislative grant-in-aid of the construction of the railroad, the lands are of known mineral character and valuable for oil, gas, sodium, potassium and geothermal resources, the patent under sec. 321(b) of the Transportation Act of 1940, 49 U.S.C. § 65(b) (1970) may be issued only with reservation of such minerals pursuant to 30 U.S.C. §§ 121-123, 1024 (1970), even though the purchaser to whom the railroad conveyed the lands did not know them to be so valuable at the time of his purchase.

Patents of Public Lands: Reservations

Although an innocent purchaser for value acquired lands from the railroad in 1938, a patent under section 321(b) of the Transportation Act may now issue only if the appropriate reservations for ditches and canals and Leasing Act minerals are included.

APPEARANCES: R. L. Knox, Esq., for appellant; David K. Grayson, Esq., Office of the Solicitor, for appellee.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

This appeal arises from a decision of October 2, 1972, by the California State Office, Bureau of Land Management, requiring appellant to pay \$10 as nominal cost of the preparation and issuance of the patent as well as \$1.00 per acre as cost of survey fees for each of the 37,653.84 acres covered by its application under section 321(b) of the Transportation Act of 1940, 49 U.S.C. § 65(b) (1970). The demand for payment was made pursuant to 43 U.S.C. § 881 (1970) which requires payment for "the cost of surveying, selecting, and conveying the same by said company or persons in interest." The decision further stated that patent would issue subject to a reservation for ditches and canals under the Act of 1890, 43 U.S.C. § 945 (1970), as well as a reservation of oil, gas, sodium and potash under the Act of July 17, 1914, as amended, 30 U.S.C. §§ 121-123 (1970).

The lands applied for are within the primary limits of the Southern Pacific Railroad grant of March 3, 1871, 16 Stat. 573. By inadvertence or otherwise, the lands, although surveyed prior to 1905, were not conveyed to the railroad prior to their inundation in 1905-1906. The lands now form part of the bed of the Salton Sea. They were under flowage easement to the Imperial Irrigation District from 1916 until 1938 when the District acquired them by purchase from the railroad. Imperial was found to be an innocent purchaser within the purview of the 1940 Act. The issues on appeal relate to the demand for survey fees and reservations to be inserted in the patent.

As noted above, the costs of survey of railroad lands must be paid before patent may issue, 43 U.S.C. § 881, supra, and 43 CFR 2631.3, 1822.1-1. The charges were levied in accordance with the BLM Manual § 1371.56, providing, in material part, as follows:

A. Costs of Survey. Applicants for patents on the remaining unpatented railroad grant lands are required to (1) furnish receipts or other evidence showing that survey costs have been paid, or (2) pay a flat charge of \$1.00 per acre (or fraction thereof) in lieu of the actual costs incurred by the Government for surveys performed in prior years, or (3) reimburse BLM for actual surveying costs (plus overhead) if new surveys are required.

B. Costs of Preparing and Issuing Patent. 43 CFR 2224.3-6 [now 43 CFR 2633.4] requires that the cost of preparing and issuing a patent on railroad grant lands shall be paid by the carrier. Costs are computed based on direct labor (including leave surcharge), plus 25% overhead.

Appellant contends that the charges are excessive for surveyed lands now under water. Appellee argues that the charge is reasonable and designed to recover the cost of service not only under 43 U.S.C. § 881, but also under 31 U.S.C. § 483(a) (1970).

The \$1.00 per acre charge for survey costs may be incorrect in the present case. The BLM Manual instruction, 1371.56 A(2), appears to anticipate lieu charges at the \$1.00 rate when actual costs cannot be ascertained or for averaging purposes. But where survey costs can be readily ascertained the applicant will be required to pay those actual costs – whether it is more or less than \$1.00 for each acre. In the instant case the actual costs can be readily ascertained; appellant will be required to pay the actual costs.

The surveys involved in this case were all made under contract prior to 1905. The contracts and instructions for the surveys are readily available. The gross cost of each survey can be readily calculated from the contract terms, and the ratable cost per acre surveyed. It is incumbent upon appellee to accurately calculate the survey costs per acre from those records for the lands included in this application.

Notwithstanding that reservation for ditches and canals can serve no useful purpose in the instant case, the statute, 43 U.S.C. § 945 (1970), permits no deviation from its mandate that in "all patents for lands taken up after August 30, 1890 * * * west of the one hundredth meridian, it shall be expressed that there is reserved from the lands in said patent described a right of way thereon for ditches or canals constructed by the authority of the United States."

Turning to appellant's contention that no minerals should be reserved, we direct attention to Anderson v. McKay, 211 F.2d 798 (D.C. Cir. 1954), which affirmed the Departmental decision in Buckholts v. Anderson, 56 I.D. 44 (1936), holding that unpatented lands within the primary limits of railroad grants are subject to the provisions of the Act of July 14, 1914, supra. In Anderson, the Court adverted to Barden v. Northern Pacific R.R. Co., 154 U.S. 288 (1894), in which the Supreme Court held that there was specific exception of minerals set forth in the statute making the grant of lands to the railroads, and prior to issuance of patent – which involved a determination by authorized Government officials that the land was nonmineral and patentable – the railroad had no claim to any lands containing minerals. Similarly, persons seeking title from the United States under nonmineral land laws, such as homestead entries under 43 U.S.C. § 161 et seq. (1970), could obtain patent only to nonmineral lands. But in 1914 the Congress introduced a new concept into the treatment of lands valuable for certain specified minerals, e.g., oil, gas, potassium. Thereafter entry to land

made under the nonmineral land laws for land valuable for the named minerals could be permitted with reservation to the United States of the named minerals. This Department in Southern Pacific Company, 71 I.D. 224 (1964), reiterated that patents for railroad grants are properly subject to reservation of the 1914 Act minerals if the lands are known to be valuable for such minerals at any time prior to the issuance of patent, even though they were not known to be so valuable at the time of sale by the railroad to an innocent purchaser.

So, as the lands sought (or some of them) are now known to be valuable for oil, gas, potassium, sodium or geothermal resources, 1/ these minerals must be appropriately reserved to the United States in accordance with the 1914 Act, supra, or the Geothermal Steam Act of 1970, 2/ or both.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the determination that patent may issue with appropriate reservations is affirmed as modified. That portion of the decision purporting to levy survey charges of \$1.00 per acre is vacated. The case is remanded for appropriate processing in accordance with the views expressed herein.

Douglas E. Henriques
Administrative Judge

We concur.

Frederick Fishman
Administrative Judge

Edward W. Stuebing
Administrative Judge

1/ Sec. 25 of the Geothermal Steam Act of 1970, Act of December 24, 1970, Pub. L. 91-581, 84 Stat. 1566, 1573, 30 U.S.C.A. § 1024.

2/ Fn. 1, supra.

