

HUDSON INVESTMENT COMPANY ET AL.

IBLA 73-235

Decided September 13, 1974

Appeal from decision of Chief, Branch of Lands and Minerals Operations, Bureau of Land Management, Portland, Oregon, rejecting application OR 7654 for issuance of an amended patent to an Oregon Donation Land Claim.

Affirmed.

1. Surveys of Public Lands: Generally

The rule of priority in resolving an internal inconsistency on the face of the official plat of survey is that the more reliable calls for distance prevail over the computation of acreage.

2. Patents of Public Lands: Generally--Surveys of Public Lands:  
Generally

Where the extent of an Oregon Donation Claim was determined in the issuance of the certificate and patent by the correct choice between the inconsistent distance calls and acreage computation on the official plat of survey, the action was proper and did not constitute a resurvey of the claim.

3. Applications and Entries: Amendments-- and Entries:  
Relinquishments--Federal Employees and Officers: Generally--Public  
Lands: Disposals of: Generally--Regulations: Generally

In the absence of proof of a general administrative practice to notify claimants who filed notification of settlement claiming excessive acreage, and in the absence of proof that the claimant was not notified, no error in the issuance of an Oregon Donation Claim Certificate and patent is shown sufficient to overcome the presumption of administrative regularity, and sufficient to warrant an amendment of the patent.

4. Applications and Entries: Amendments--Patents of Public Lands:

Amendments

An application for amendment of patent by the successors of an Oregon Donation Claim patentee is properly rejected when the applicants request patent to land to which the original settler was not entitled because it would have exceeded his statutory entitlement.

5. Patents of Public Lands: Amendments--Surveys of Public Lands:

Generally

When a patent was issued in conformity with the duly approved survey at the time of the grant, the rights of patent amendment applicants are not altered or enlarged by the acreage returns in a subsequent private resurvey.

6. Administrative Authority: Estoppel--Patents of Public Lands:

Amendments--Title: Generally

Reliance on erroneous notations in federal and county land records can neither serve to divest the United States of title to land, nor estop the United States from denying that title passed or from concluding that a patent cannot be amended to include certain land.

APPEARANCES: Howard M. Feuerstein, Esq., of Davies, Biggs, Strayer, Stoel and Boley, Portland, Oregon, for appellants; Robert H. Memovich, Esq., and Joseph B. Brooks, Esq., Office of the Regional Solicitor, Department of the Interior, Portland, Oregon, for appellee.

OPINION BY ADMINISTRATIVE JUDGE THOMPSON

In late 1969 the Bureau of Land Management (BLM), while converting land records to microfilm, discovered that Lot 5 of section 4, T. 1 S., R. 1 W., Willamette Meridian, Washington County, Oregon, had never been patented, but was in federal ownership. After some correspondence with the record owners according to Washington County land and tax records, the BLM issued a proposed notice of classification of public land for transfer out of federal ownership, 35 F.R. 6766 (1970), pursuant to the Public Land Sale Act, 43 U.S.C. §§ 1421-27 (1970).

In response, on February 26, 1971, Hudson Investment Company and the other applicants 1/ filed application OR 7654 for issuance of an additional or amended patent to include Lot 5 in a patent of an Oregon Donation Land Claim. The application was filed under the Act of May 24, 1824, as amended, 43 U.S.C. § 697 (1970), and 43 CFR 1821.6, which authorize the amendment of entries and patents to correct errors in the description of lands entered and intended to be entered. The statute and the implementing regulations provide for the amendment of patents in cases of mistaken entry upon showing, inter alia: (1) how the mistake occurred; (2) that reasonable precaution was taken to avoid the error at the time of entry; and (3) the applicant's "utmost good faith."

On July 21, 1972, the Oregon State Office issued a decision rejecting the application. This decision was vacated in August 1972 at the applicants' written request for reconsideration in the light of additional information to be supplied. After the applicants filed a memorandum in support of the application containing new legal

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1/ The following parties, who have joined as applicants and appellants, assert ownership of, or rights under a contract for sale to Lot 5: Hudson Investment Company and Catherina Albino for Parcel No. 1 (part of Washington County Tax Lot 3800, the major portion of Lot 5 northeast of Walker Road); Ruth Realty Company, Oregon Electric Railway Company, First National Bank of Oregon, Carl R. Windolph and Windolph Brothers Investment Company for Parcel No. 2 (part of Washington County Tax Lot 100, the portion of Lot 5 southwest of Walker Road); and Anthony Gerace for Parcel No. 3 (part of Washington County Tax Lot 300, a triangle of land at the west edge of the portion of Lot 5 northeast of Walker Road).

arguments and reasserting those in the original application, the Oregon State Office issued a decision on December 4, 1972, again denying the application, on the grounds: (1) that the additional grant would exceed their predecessor's statutory entitlement; (2) that the applicants failed to show any error or mistake in the description of the land; (3) that they failed to show the utmost good faith; and (4) that they failed to show their predecessor's reasonable precaution to avoid the claimed error, as required by 43 CFR 1821.6-3(a).

The applicants filed a timely notice of appeal. By order of this Board they were granted an extension of time to file their statement of reasons for appeal in order to examine land records in the Regional and National Archives. The Regional Solicitor was similarly granted an extension of time to file his answer. By order dated March 26, 1974, this Board granted appellants' request for permission to file a reply brief. Consideration of the case was further postponed pending the filing of an answer to the reply brief by the Regional Solicitor.

The appellants assert that patent to Lot 5 of section 4, T. 1 S., R. 1 W., should have issued to William E. Walker, their remote predecessor in interest, 2/ over 100 years ago. In support of this

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2/ The regulations provide for the issuance of amended patent to transferees of the original entryman, 43 CFR 1821.6-3(c)(1), and

assertion, appellants have outlined the following chronology of the facts and circumstances showing the nature and source of the claimed error.

On September 27, 1850, Congress enacted the Oregon Donation Claims Act, 9 Stat. 496. Section 5 of the Act, 9 Stat. 498, provided that all white, married, male citizens emigrating to Oregon between December 1, 1850, and December 1, 1853, would be granted 320 acres of public land upon notification of settlement and cultivation to the Surveyor General, and upon completion of the survey of the claimed lands, one half to the husband, and the other half to the wife in her own right. No person was to receive a patent for more than one donation in his or her own right. William E. and Hannah Walker, according to the affidavits filed in support of their claim, arrived and settled in the Willamette Valley in the winter of 1852-53 (Ex. H submitted with statement of reasons for appeal, hereinafter S/R Ex.). On March 14, 1853, William Walker filed a notification of settlement which was improperly captioned "Township 1 S., R. 1 W." only, although it described lands in T. 1 N. as well (Ex. A submitted with original application, hereinafter App. Ex.). In July 1853 William Walker executed a new notification (App. Ex. B) with a proper township caption that described the following lands:

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(fn. 2 Cont.)

allow the patent to issue in the name of the transferees. 43 CFR 1821.6-3(c)(2).

SW 1/4 of SW 1/4 Sec. 33 T. 1 N., R. 1 W.

S fractional 1/2 of SE 1/4 Sec. 32 " "

W fractional 1/2 of NW 1/4 Sec. 4 T. 1 S., "

E 1/2 of NE 1/4 Sec. 5 " "

E 1/2 of W 1/2 of NE 1/4 Sec. 5 " "

and vacant land adjoining on the South to make 320 acres.

The vacant land adjoining on the south to which the Walkers laid claim was delimited by the June 1853 survey of the claim of Lawrence Hall, the Walkers' neighbor to the south (S/R Ex. G).

On October 31, 1862, the Register and Receiver of the then Oregon City Land Office issued Donation Certificate No. 1303 to Mr. and Mrs. Walker. The Certificate described the lands according to the lot numbers assigned on the survey plats for the two townships in question 3/ as follows:

Lots No. 1 & 2 of Section 32	T. 1 N., R. 1 W. = 59.20 acres	" "
1 " " 33	T. 1 N., R. 1 W. = 39.60 "	" " 2 " " 4 T. 1 S., R. 1 W. =
39.15 "	Frl. NW 1/4 of NW 1/4 of Sec. 4	T. 1 S., R. 1 W. = 38.92 " " E 1/2 "
NE 1/4 " " 5	T. 1 S., R. 1 W. = 78.98 "	& Lots No. 1, 2 & 3 " " 5 T. 1 S., R. 1 W. =
<u>63.01</u> "		Containing 318.86
acres		

3/ The survey plat of claims in T. 1 S., R. 1 W., Willamette Meridian, was approved as "strictly conformable to the field notes

(App. Ex. C). The Certificate did not include Lot 5 of section 4, T. 1 S., R. 1 W., shown on the 1862 survey plat as containing 12.33 acres. Appellants assert their right to an amended or additional patent to this lot. The lot is a trapezium bounded on the north by Lot 2, section 4, on the west by Lot 3, section 5, both patented to William Walker, and on the south and east by land patented to Lawrence Hall in Donation Claim 43. This parcel will hereafter be referred to as Lot 5.

Appellants assert that Lot 5 was erroneously excluded from William Walker's Certificate and patent because of the surveyor's failure to draft the survey plat for section 32 of T. 1 N., R. 1 W., in accordance with the field notes and monumentation of that part of the township. This central error "was compounded by a surprisingly large number of other errors which, taken together, justifiably led the world, as well as Walker, to believe that he had, in fact, been granted Lot 5" (Rebuttal Brief at 2).

The acreage computations in the Donation Certificate reflect the returns marked on the survey plats for the lots in both townships except for the acreage of Lot 1 of section 32, T. 1 N., R. 1 W. This parcel will hereafter be referred to as Lot 1. Lot 1 was

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fn. 3 (Cont.)

of the survey thereof" by the Surveyor General of Oregon on January 16, 1862 (App. Ex. E). The map of T. 1 N., R. 1 W., was likewise approved September 25, 1862 (App. Ex. F).

computed for the Certificate as 19.20 acres, although the acreage computation on the survey plat is 9.60 acres (App. Ex. F). Apparently the Surveyor's Office used the boundary line calls of the prior surveys surrounding Lot 1 of the Walkers' claim, which were contained in the survey field notes (Ex. 14) and the survey plat (App. Ex. F), to determine that the area of Lot 1 was 19.20 acres.

Using 19.20 acres as the correct area of Lot 1, the issuer of the Certificate apparently determined that under the rule of approximation, <sup>4/</sup> which both parties concede is applicable in such circumstances, Lot 5 could not be included in the donation without exceeding the 320-acre limit of the grant to the donation claimant and his wife.

The omission of Lot 5 from Donation Certificate No. 1303 was repeated in the patent issued to William E. Walker and his wife on March 8, 1866, which described the lands contained in the Certificate and recited that they contained 318.86 acres (App. Ex. D). Under circumstances not disclosed by the record it was discovered that the patent recited that all the land was in T. 1 S., R. 1 W. Although

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<sup>4/</sup> The rule of approximation requires that when the excess of an entry over the 320-acre limit is greater than the deficiency if the smallest legal subdivision were excluded, then that subdivision must be excluded; but if the excess is less than the deficiency should the smallest legal subdivision be excluded, the subdivision should be included. Byron K. Baker, A-28662 (August 2, 1961); Henry C. Tingley, 8 L.D. 205 (1889); Andrew J. Allen, 7 L.D. 545 (1888); Henry P. Sayles, 2 L.D. 88 (1883).

the patent had already been recorded on the T. 1 S. Tract Book (Ex. 6), it was canceled and a new patent was issued on November 11, 1869, correctly describing the townships involved (Ex. 3). This patent again recited that the described lands contained 318.86 acres, and again Lot 5 was not listed.

Appellants' first argument derives from the survey instructions contained in the Act of February 11, 1805, as amended, 43 U.S.C. § 752 (1970), which provides in part:

Each section or subdivision of section, the contents whereof have been returned by the Secretary of the Interior or such agency as he may designate, shall be held and considered as containing the exact quantity expressed in such return \* \* \*.

Appellants argue that under this Act the Government is bound by its survey return to treat Lot 1 as containing 9.60 acres. They contend that the determination that Lot 1 contained 19.20 acres was a revocation of the original approval given the survey plat and thus an invalid resurvey.

It has been held by the Department that the approved plat of the official survey, conclusive as to the boundaries and quantity of land, governs the disposal of the lands it covers. Mason v.

Cromwell, 26 L.D. 369 (1898); George W. Fisher, 24 L.D. 480 (1897). A patent duly issued in conformity with the survey incorporates the survey plat. Cragin v. Powell, 128 U.S. 691 (1888); Alaska United Gold Mining Co. v. Cincinnati-Alaska Mining Co., 45 L.D. 330 (1916). The patent issued to William Walker and his wife on November 10, 1869, recited that it was issued in conformity with the official survey plat (Ex. 1, App. Ex. D). Thus, appellants argue, the patent and certificate, using the "wrong" acreage for Lot 1, erroneously recited the acreage granted to the Walkers, and erroneously excluded Lot 5.

Appellants assert that if the 9.60 acres recited on the 1862 survey plat of T. 1 N. is used as the acreage of Lot 1, the lands covered by Donation Certificate No. 1303 amounted to only 309.26 acres, and the Walkers were entitled to all the lands Walker claimed in his notification of settlement. With Lot 5, the Walkers would have received 321.59 acres; it would have been unnecessary under the rule of approximation to exclude either Lot 5 or Lot 1.

The determination that Lot 1 contained 19.20 acres was not a revocation of approval of the survey nor an invalid resurvey, as appellants argue. The Surveyor General approved an internally inconsistent plat of survey for T. 1 N., R. 1 W. The acreage computation for Lot 1 is 9.60 acres, but the distance calls also on the face of

the plat indicate that the lot must be about twice that large. <sup>5/</sup> The Register and Receiver who issued Donation Certificate No. 1303 did not resurvey the lot, nor did the Certificate "contain a description which has not been approved by the Surveyor General" (statement of reasons at 9).

The issue presented is thus not whether the Register could recompute or alter the acreage of Lot 1, but whether he correctly resolved an inconsistency on the face of the survey plat that had to be resolved in order to issue the Certificate. We conclude that the Register correctly resolved the inconsistency on the survey plat for T. 1 N., R. 1 W., by using the distance calls in issuing the Walkers' Donation Certificate.

[1] The general rule of priority used in determining the extent of a disputed conveyance is set out in United States v. Redondo Development Co., 254 F. 656, 658 (8th Cir. 1918):

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<sup>5/</sup> The patent and Certificate used 19.20 acres as the area of Lot 1. The Register could have reached this result by treating the lot as a rectangle 20 chains (the east boundary) by 9.60 chains (the south boundary). The BLM decision notes that the lot, because it is not a perfect rectangle, has an area of 19.10 acres, with a north boundary of 9.50 chains, and a south line of 9.60 chains (Dec. at 5). However, the east boundary of Lemuel Sparks' claim in T. 1 N. is 39.25 chains. When the 20 chains on the west side of James Scott's claim, which is north of Lots 1 and 2, are subtracted then the west line of Lot 1 is 19.25 chains, not the 20.00 chains used by the BLM decision. The lot is thus, according to the plat's distance calls, about 18.74 acres. Treatment of the lot as 19.20 acres does not change the application of the rule of approximation or the result in this case. For the purpose of this decision, the 19.20-acre figure will be used in discussing the issues.

\* \* \* First, natural monuments or objects \* \* \*; second, artificial marks, stakes, or other objects, made or placed by the hand of man, as in this case; third, courses and distances in documents or writings prescribing or reporting the establishment of the lines; lastly, recitals of quantity. [T]he rule \* \* \* proceeds upon considerations of the comparative certainty or fallibility of the evidences of the intention of the qualified authority, public or private, by which the boundary was prescribed. \* \* \*

Accord, Ainsa v. United States, 161 U.S. 208, 229 (1896); Texas Pacific Coal & Oil Co. v. Masterson, 160 Tex. 548, 334 S.W. 2d 436, 439 (1960); Askins v. British-American Oil Producing Co., 201 Okla. 209, 203 P.2d 877 (1949); Thomsen v. Keil, 48 Nev. 1, 226 P. 309 (1924); 12 AM. JUR. 2d Boundaries §§ 75-76 (1964). See authorities collected in Coast Indian Community, 3 IBLA 285, 292 (1971).

The Register properly presaged this rule in choosing to use the more reliable calls for distance rather than the computation of acreage. The record supports the assertion of the Regional Solicitor that the error in the acreage computation for Lot 1 was an error of transcription, not of survey, i.e., the draftsman in the Oregon Surveyor General's office intended to write 9.60 along the south

boundary of Lot 1 to complement the 10.40 call for the distance from the quarter section corner to the east boundary of Lemuel Sparks' claim, so that the south boundary of the southeast quarter of section 32, T. 1 N., could be seen on the map to be regular (See App. Ex. F). While it is unnecessary to rule on the exact cause of the mistake in the acreage computation for Lot 1, this explanation strongly supports adherence to the rule that calls for distance, fixed after fewer steps of computation or transcription, are more reliable than computations of acreage.

Adherence to the calls for distance is also supported by reference to the field notes of the approved survey (Ex. 14). The field notes form part of the survey, and are to be considered along with the township survey plat in resolving questions regarding grants of public land. Heath v. Wallace, 138 U.S. 573, 583 (1891); Cragin v. Powell, supra at 696. The field notes for the survey of Claim 59 to the Walkers' west describe an eastern boundary of 39.25 chains, 20.00 chains bordering on James Scott's Claim 58 to the north of the Walkers. This leaves 19.25 chains as the west boundary of Lot 1 (Ex. 1, field notebook pp. 358-59). Similarly, the field notes for the survey of James Scott's claim indicate that the northern boundary of the Walkers' claim in section 32 was 29.50 chains (Ex. 14, field notebook p. 357). The acreage enclosed in such a quadrilateral is approximately the 59.20

acres listed in the Certificate as the acreage of Lots 1 and 2 in section 32, T. 1 N. 6/

[2] When the survey plat accurately reflecting these field measurements was drawn, and Lot 2 was drafted as a regular quarter quarter section (20 chains by 20 chains for 40 acres), Lot 1 necessarily contained the 19.20 acres remaining in the portion of the Walkers' claim in section 32. Thus, when the Register considered the plat in conjunction with the survey field notes, he was constrained to use the distance calls rather than the acreage computation in issuing the Certificate and patent. This did not constitute a resurvey of the claim.

Appellants' second argument is that the crucial "error" analyzed above was compounded by the Register's "arbitrarily omitting Lot 5 from the Walkers' claim even though it was the stated policy of the land office to notify claimants who had claimed too much land and allow them to decide which parcel to omit" (Rebuttal Brief at 4).

This policy is assertedly found in a letter dated January 28, 1854, from the Surveyor General of Oregon (S/R Ex. V), and the practice is exemplified by another letter from the Surveyor General dated March 28, 1854, returning a notification that requested more than

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6/ See note 5 supra.

320 acres for a new description including the improvements on the claim (S/R Ex. W).

Appellants argue that if this practice had been followed and the Register had notified the Walkers that their notification claimed excessive acreage, the Walkers would have chosen to include Lot 5 and omit Lot 1 or some other larger lot. The argument is based on the assertion that the Walker home, thought to have been built in 1857 (S/R Ex. U), and barn were on Walker Road on or near the north edge of Lot 5, and the Walkers would have wanted to exclude distant acreage rather than land on or near their barnyard.

In support of their application appellants presented sworn statements by three long-time residents of the Beaverton area taken by the Title Insurance Company of Oregon, to the effect that they recalled the location of the old barn of Robert Walker, son of the donation claimants, and other improvements, and had marked these locations on maps provided for that purpose (App. Exs. J through M-4). The exhibits demonstrate that until 1945, when affiant Edwin A. Neupert demolished it, an old barn then "80 or 90 years old" stood to the south of Walker Road across from the old Walker house, near an existing barn and near the northwest corner of Lot 5 (App. Ex. L. See S/R Ex. Z). 7/

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7/ Appellants also rely on the evidence contained in the sworn statements concerning a house and barn no longer extant referred to as the "Lil Barnes" place and a road to the "Garbarino place" around

As Lot 5 was the smallest subdivision, it is as logical a supposition that the Walkers would have excluded it, rather than a larger one, as appellants argue. Appellants have not persuasively shown that the Walkers might have wanted Lot 5 if put to a choice. They have also failed to show that error was committed for additional reasons. The exhibits introduced do not support an inference of a binding rule at that time to notify claimants. The "requirement," asserted by appellants, of notice to the claimant followed by selection and relinquishment, does not appear to have been set out as a Departmental rule in approximation cases until Henry C. Tingley, 8 L.D. 205, 206-07 (1889). See May v. Coleman, 28 L.D. 11, 13 (1899). Cf. Andrew J. Allen, 7 L.D. 545 (1888) (notice to claimant to relinquish half of claim because of wife's death); William Bland, 2 L.D. 428 (1884) (relinquishment in patent amendment application case).

[3] The Surveyor General's letters relied upon by appellants are not sufficient to show that the proper administrative practice at that time was not followed. The letters did not relate to the Walkers' claim and do not establish a general rule which would be

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fn. 7 (Cont.)

the south border and southeast corner of Lot 5 (App. Exs. J-K, M-1). The record discloses, however, that these uses of Lot 5 occurred subsequent to the 1889 grant of part of Lot 5 from Robert Walker to one J. M. Smith (App. Ex. G). Thus this evidence, while it may tend to show that Robert Walker asserted ownership or possession of Lot 5, does not go to showing any error on the part of the Register prior to issuance of the Certificate in 1862.

applicable to it. Also, the letters are addressed to someone, presumably the Register, other than the claimant whose notification was defective. Thus Exhibit W equally supports the conclusion that the Register was to approve the new description of the claimed lands. There is a presumption of regularity of administrative proceedings, which is applicable to land office proceedings. Harkrader v. Carroll, 76 F. 474 (D. Alas. 1896). See 9 WIGMORE ON EVIDENCE, Presumptions § 2534 (3d ed. 1940). Applying the presumption of regularity, we assume that the rule of approximation was applied in issuing Donation Certificate No. 1303, and the Register did consider improvements in making the determination.

Independent of the Register's alleged duty to notify the Walkers, we note that there is no evidence in the record, except the circumstantial evidence that the old barn on or near the corner of Lot 5 might have been erected prior to the issuance of the Certificate excluding Lot 5, that the Register did not consult with the Walkers prior to issuing the Certificate. Appellants have not submitted evidence which demonstrates that error was committed in this regard.

[4] Even if the substitution of Lot 5 for some other lot would have been justified at the time of the issuance of the Certificate and patent, the regulations require that in order for the transferee of an erroneous patent to receive an amended patent, the applicant must be able to reconvey the land embraced in the erroneous patent free of encumbrances. 43 CFR 1821.6-3(c)(1). William Bland, supra.

See John Crosby, 3 L.D. 139 (1884). According to the survey plat, which the Register correctly read, if Lot 5 were to be added to the Walkers' patent, the claim would embrace more than 320 acres. Thus in order for amended patent to issue now, the appellants would have to be able to reconvey the donation claim in order to permit the excision of some other parcel so that the Walkers' successors would not receive more than the Walkers' entitlement. §/ See 43 CFR 1821.6-3(c)(1). This has not been done here. We mention this to point out the difficulties of amending patents long after title has passed from the United States.

Since Lot 1 was properly treated as containing 19.20 acres rather than 9.60 acres, the rule of approximation was correctly applied by the Register to exclude Lot 5 from the 320-acre entitlement of the Walkers. This analysis of the facts and circumstances surrounding the alleged crucial error show that in fact no error was committed in the issuance of the Certificate and patent to the Walkers excluding Lot 5 which would warrant amending the patent. Rather, it appears that Lot 5 was properly and deliberately excluded to avoid an excess of acreage. Appellants'

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§/ The survey plat governs the disposal of these lands to claimants under the Walkers' entitlement. This issue is discussed infra.

The difficulty the distant successor in interest has in meeting these necessary requirements has been noted in another context of the patent amendment regulations. See Elizabeth B. Poncia, A-28982 (August 17, 1962); Henry S. Morgan, 65 I.D. 284, 288 (1958). This difficulty does not obviate the necessity of compliance in any way.

reliance on Murphy v. Sanford, 11 L.D. 123 (1890), and William Bland, *supra*, is misplaced (Application at 16-18). In both cases the issuance of an additional patent for omitted land did not present a rule of approximation problem. Appellants have failed to make the showing of error required by 43 CFR 1821.6-3(a).

Because the Walkers were not entitled to Lot 5 in 1862 when the Certificate based on the approved survey plat was issued, their successors in interest can have no right to it now. It is thus unnecessary to determine whether appellants have complied with other requirements of the regulations governing patent amendments, including a showing that reasonable precautions have been taken to avoid error prior to the erroneous entry and that the utmost good faith be shown. 43 CFR 1821.6-3(a). 9/

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9/ Two comments suffice to show some of the additional problems these unreachd requirements pose. Regarding reasonable precaution prior to entry, the Department has noted a number of times the almost insurmountable burden of showing a predecessor's reasonable precautions over 100 years ago. Faydrex, Inc., 14 IBLA 195 (1974); Elizabeth B. Poncia, *supra*; Harold K. Butson, A-26285 (December 29, 1951). Here, however, the land was unsurveyed at the time of entry, 1853, and there was no error in the notification of settlement, which served as the entry in this case. The notification did describe both Lot 1 and Lot 5 (App. Ex. B).

On the issue of good faith, appellants would be plagued by: their failure to show with any certainty that improvements were ever located on Lot 5 prior to issuance of the Certificate (App. Exs. K through M-4); the failure of the Walkers and their successors to notice or object to the omission of Lot 5 in the Donation Certificate and the patent, the contents of which were matters of constructive notice to the patentees, Le Marchal v. Tegarden, Tegarden, *supra* at 685; and the fact that the patent was not recorded in Washington County until 1908 (Brief for Respondent at 18), after the 1889 transfer of a portion of Lot 5 by the Walkers' son and heir (App. Ex. G).

The BLM decision misleadingly says that "[a]cceptance of the applicants' contentions depends on the correct area of Lot 1 \* \* \*." Appellants' third argument on appeal is that if the BLM can ignore the acreage computation for Lot 1 and resurvey it to find the "correct area," they are entitled to do so with Lot 1 and the rest of the Walker Donation Land Claim. They have introduced the results of a private survey to show that the entire Walker claim, including Lot 5, encompasses 316.28 acres (S/R Ex. X-Z, statement of reasons at 20).

[5] Appellants' reliance on such a resurvey is misplaced. The issue is not the actual area of Lot 1, but what was the size of Lot 1 according to the survey plat for the purpose of issuing patent to the Walkers. Rights granted by patent issued under the public land laws in accordance with an approved plat of survey cannot be divested or enlarged by a subsequent public or private resurvey. United States v. State Investment Co., 264 U.S. 206, 212 (1924); Wiegert v. Northern Pacific Railway Co., 48 L.D. 48 (1921); Isaac T. Wheeler, 43 L.D. 113 (1914). For instance, in Mason v. Cromwell, supra at 371, a 40-acre additional homestead entry was denied because the applicant had already received his statutory limit, 160 acres, in a prior patent to a quarter section homestead. The entryman argued that the quarter section, returned as a regular, 160-acre plot, in fact only contained 120 acres. The surveyor's return was held conclusive, and the entryman was bound by the land description and computation of acreage contained in the survey.

The survey plats for the two townships involved in this case were duly approved, and Donation Certificate No. 1303 and the Walkers' patent issued according to the survey. The Walkers' rights were controlled by the Certificate and patent, and the appellants, their successors, cannot enlarge the Walkers' rights by the assertion that the 1862 survey showed some lots to be larger than their 1973 "resurvey" shows them to be. As we have held above, the Register properly resolved the internal inconsistency in the controlling survey plat by using the more reliable calls for distance, corroborated by the field notes, rather than the acreage computation.

Appellants' fourth argument is that the Government is estopped to deny that the grant of Lot 5 should have been made, or that Lot 5 was granted to the Walkers, asserting the following facts: (1) the Oregon Tract Book for T. 1 S. shows Lot 5 as having been patented to William Walker (Ex. 6); (2) the survey of claims plat for T. 1 N. maintained for public use contains the 9.60-acre computation for Lot 1 (App. Ex. F); (3) the Historical Index maintained by the BLM, current to February 1971, records that 89.20 acres in T. 1 N., passed under the Walker patent of November 10, 1869, a figure which incorporates 9.60 acres as the size of Lot 1; (4) the Master Title Plat itself recites the acreage of Lot 1 as 9.60 (Ex. 9); and (5) since 1908, Washington County land records have shown Lot 5 to be in private ownership. Appellants claim that they have innocently relied to their detriment on these public records that show that Lot 1 was treated as containing 9.60 acres and that Lot 5 was or should have been properly patented to the Walkers.

However, there is additional material in the record that indicates that this reliance was not so reasonable. The Master Title Plat for T. 1 N. may lead one to believe that Lot 1 was treated as containing 9.60 acres, but the Historical Index for T. 1 S. clearly does not include Lot 5 in the lands patented to the Walkers (Ex. 10). The Oregon Tract Book notation that Lot 5 was patented is marked with the warning that a corrected patent had been issued to Walker (Ex. 6). The Tract Book relied on by appellants contained a reference to the book in which the patent was recorded (Ex. 6). There has been no assertion that the patent itself was erroneously recorded in that book.

[6] 43 CFR 1810.3(c) provides:

Reliance upon information or opinion of any officer, agent or employee or on records maintained by land offices cannot operate to vest any right not authorized by law.

This regulation and 43 CFR 1810.3(a) and (b) apply the generally prevailing judicial rule that laches or estoppel does not apply to the United States. Utah Power & Light Co. v. United States, 243 U.S. 389, 409 (1917); Atlantic Richfield Co. v. Hickel, 432 F.2d 587, 591 (10th Cir. 1970); Beaver v. United States, 350 F.2d 4, 8-9 (9th Cir. 1965), cert. denied, 383 U.S. 937 (1966). Some recent cases have made

inroads on the judicial rule by holding that estoppel can be applied against the Government when its absence would work severe injustice and the public interest would not be damaged by its imposition. United States v. Lazy FC Ranch, 481 F.2d 985 (9th Cir. 1973), citing Brandt v. Hickel, 427 F.2d 53 (9th Cir. 1970). <sup>10/</sup> The facts in those cases however, are distinguishable from these, and the general rule applies here. Estoppel cannot be employed in this case without greatly harming the public interest in the public lands. The estoppel asserted here would divest the Government of title to land which was never patented, and to which patent was never earned under the public land laws. The records relied on by appellants might give them protection against bona fide purchasers under state law of constructive notice, but these records cannot be used to assert title against the United States. See Beaver v. United States, supra.

Title to public lands is granted by patent, not by land records. The grantee and his successors are on constructive notice of the contents of the patent. Le Marchal v. Tegarden, 175 F. 682 (8th Cir.

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<sup>10/</sup> In Brandt, a BLM decision rejecting an oil and gas lease offer asserted that a corrected, refiled offer would not lose priority, contrary to Departmental rule. On appeal from a Departmental decision that reversed the BLM and held the appellant's refiled offer to be junior to an intervening offer, the Government was estopped to deny the BLM assertion, on the grounds that administrative due process had been abused, and the Government was in no way prejudiced by having one, rather than another, qualified noncompetitive oil and gas lease offeror.

1909). 11/ As we concluded above, there was no error in the November 10, 1869, patent issued to the Walkers, which did not include Lot 5. As the Walkers were not entitled to Lot 5, the issuance of patent to these appellants based on erroneous land records, would serve to vest rights not authorized by law in violation of 43 CFR 1810.3(c).

Reliance on the erroneous records was in large part unfounded, and estoppel would divest the Government of title to land based on a clerical error in the records, not in the patent. In these circumstances estoppel is unavailable to appellants. Brandt v. Hickel, supra; 43 CFR 1810.3(c).

Appellants' final contention is that "[t]he government's attack on William Walker's entitlement to Lot 5 should not prevail because it would unjustifiably destroy public confidence in ancient land

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11/ Equitable title vests, in such public land entry cases, upon issuance of a final certificate. In this case, by analogy to preemption claims, the final certificate was embodied in Donation Certificate No. 1303. See Whitney v. Taylor, 158 U.S. 85, 95 (1895), citing Orchard v. Alexander, 157 U.S. 372, 383-84 (1895).

In their Rebuttal brief, appellants place strong emphasis on the assertion that there is no evidence that the Walkers ever received their patent (Rebuttal to Answer at 4-5), so that it is unrealistic for the Government to assert that the Walkers would have relied on their patent rather than their notification to determine the extent of their grant. However, the Walkers were also on notice of the deletion of Lot 5 in Donation Certificate No. 1303, which was issued seven years before the corrected patent. The grantees are equally on constructive notice of the contents of the Certificate. Le Marchal v. Tegarden, supra at 691.

records" (statement of reasons at 17). According to appellants, corrective measures such as the BLM land classification in this case would call into question the validity of all government land grants because of the frequency of survey errors in the last century.

Contrary to appellants' contentions, title derived from a government patent is not so vulnerable. After six years from issuance the United States cannot sue to annul or vacate a patent in the absence of a charge of fraud in the procurement of the patent. 43 U.S.C. § 1166 (1970). Once title has been conveyed, the Department of the Interior has no jurisdiction to alter the grant by a subsequent, corrective survey. United States v. State Investment Co., *supra*; Kean v. Calumet Canal & Improvement Co., 190 U.S. 452 (1903); Marco Island, 51 L.D. 322 (1926). In this case, however, the determination that Lot 1 contained 19.20 acres was made before the issuance of the Donation Certificate and the patent, and incorporated in both documents. Appellants were entitled to rely on the patent to the Walkers, but that patent did not include Lot 5. Appellants have not cited any authority, beyond the estoppel argument rejected above, for the proposition that reliance on erroneous tract book and master title plat entries (Exs. 6, 9) can be converted into title to the land in question. See 43 CFR 1810.3(c). Nor can title to public

land be gained alone by adverse possession. Beaver v. United States, *supra.* 12/ This argument is not persuasive.

In sum, the record shows that a mistake of transcription was made on the survey plat of T. 1 N., R. 1 W., in 1862, so that the plat bore an acreage computation inconsistent with the distance calls for the boundaries of Lot 1, section 32. The Register, in issuing the Donation Certificate to the Walkers, correctly resolved the inconsistency by using the more reliable distance calls in computing the acreage of Lot 1 as 19.20 acres. The Walkers' Certificate thus did not include Lot 5, section 4, T. 1 S. Under the rule of approximation, the inclusion of Lot 5 would have given Walker and his wife more than the 320 acres to which they were entitled. Because the Walkers were not entitled to Lot 5, appellants have not shown that any error was committed by the land office, and the patent issued to the Walkers on November 10, 1869, correctly described their entitlement. The applicants, as remote grantees from the Walkers, are not entitled to a new or amended patent including Lot 5. Nor can the errors in any land records showing Lot 1 to contain 9.60 acres and Lot 5 to have passed to Walker estop the United States from denying that patent and title to Lot 5 was issued or should have issued to William Walker and his wife. The decision of the Chief, Branch of Lands and Minerals Operations, correctly rejected the application.

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12/ Appellants' "confidence in ancient land records" may be vindicated by an application under the Color of Title Act, as amended, 43 U.S.C. § 1068 (1970). Such an application is not now before us.

Therefore, pursuant to the authority granted to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

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Joan B. Thompson  
Administrative Judge

We concur:

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Edward W. Steubing  
Administrative Judge

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Anne Poindexter Lewis  
Administrative Judge

