

HANK PATTERSON

IBLA 83-155

Decided February 28, 1983

Appeal from the Nevada State Office, Bureau of Land Management, rejecting Indian allotment application N-37182.

Affirmed.

1. Indian Allotments on Public Domain: Lands Subject to -- Patents of Public Lands: Effect

The effect of the issuance of a legal patent is to transfer legal title from the United States and to remove the land from the jurisdiction of the Department of the Interior. Where BLM records show lands have been legally patented, an Indian allotment application for such lands is properly rejected.

APPEARANCES: Richard E. Olson, Jr., Esq., Carson City, Nevada, for appellant.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

This appeal is taken from a decision, dated October 19, 1982, by the Nevada State Office, Bureau of Land Management (BLM), rejecting Indian allotment application N-37182 on the ground that the land applied for therein had been transferred from Federal ownership and was not subject to entry under the public land laws.

Hank Patterson, appellant, filed his Indian allotment application on September 27, 1982, for 1.5493 acres situated in the NW 1/4 SW 1/4 and the SW 1/4 NW 1/4, sec. 15, T. 3 S., R. 35 E., Mount Diablo meridian, Esmeralda County, Nevada, pursuant to the Act of February 8, 1887. ^{1/} BLM's records reflect that the N 1/2 SW 1/4 of sec. 15 was patented to Matthew Mount Ely, Jr., on June 25, 1934, under the Enlarged Homestead Act of February 19, 1909, 43 U.S.C. § 218 (1970). The S 1/2 NW 1/4 of sec. 15 was selected by the State of Nevada in a land exchange approved June 28, 1895.

Appellant argues in his statement of reasons that the patent to Ely should be canceled as having been improperly issued because the subject lands

^{1/} The land is more properly described by metes and bounds in the application.

were not "unappropriated" in 1934. He asserts that he has used and occupied the subject lands since 1915 and contends that such use and occupancy as an Indian removed the lands from entry under the public land laws.

[1] The effect of the issuance of a land patent is to transfer the legal title from the United States. Mary A. A. Aspinwall, 66 IBLA 367 (1982); Mary Patricia Anne Newman Gibson, 52 IBLA 216, 88 I.D. 244 (1981). The Department has held that where BLM's records show lands have been patented, the United States does not have title to them, and an Indian allotment application for such lands is properly rejected. Jimmy Lorn Gibson, 59 IBLA 170 (1981); Mary Patricia Anne Newman Gibson, *supra*.

The key issue in this appeal focuses on whether the patent was legally issued. In order to prevail with respect to his Indian allotment application, appellant must establish that the issuance of the patent was unlawful and void or voidable. See Sky Pilots of Alaska, Inc., 40 IBLA 355 (1979) for example of void patent.

Appellant provides with his statement of reasons an affidavit stating that he has used and occupied the subject land since 1915. However, Ely's "Homestead Entry Application and Affidavit," executed and notarized on December 31, 1928, includes Ely's sworn statement "* * * that the land is not occupied and improved by any Indian * * *." Moreover, Ely's final homestead proof and application for the patent contains sworn statements from himself and witnesses which declare that the lands were used and occupied at that time (1929-34) by Ely and his family. These statements were confirmed upon investigation by a special agent of this Department on August 11, 1934. Moreover, in his certificate of eligibility, dated in 1930, appellant declares that he lived in Death Valley, California, for the preceding 6 years, which includes the period when Ely entered upon the subject public land. ^{2/} Further, in that document, in response to item 2 on the form, "Residence on May 18, 1928," appellant answered, "Scotty's Ranch, Death Valley, Calif."

Appellant's contentions are based on his assertions that "[i]t is clearly established that [appellant] used and occupied the land for which he has applied as his Indian Allotment for many years prior to the patent of that land to Matthew Mount Ely, Jr. in 1934." We do not see where that fact is "clearly established." There is nothing of record to refute the propriety of Ely's patent application except appellant's affidavit. An affidavit is not proof of the alleged facts contained therein. See Fairfield Mining Co., Inc., 66 IBLA 115, 119 (1982); 3 Am. Jur. 2d Affidavits §§ 28, 29 (1962).

Based upon the evidence offered, and all else appearing regular, we cannot rule that the patent was improperly issued. Appellant's arguments are

^{2/} The file for Ely's homestead contains a reference that, "This is the same land which David Coleman made entry for some years ago and his serial No. was 010267." Letter from the Clerk, Esmeralda County, Nevada, dated January 7, 1929. The file contains no reference to any use or occupancy of the land by appellant.

based upon an assertion which he has failed to prove. Thus, appellant has not presented clear and substantial evidence that BLM's decision to dismiss his application was improper, and this Board can find no basis for recommending litigation seeking partial cancellation of the Ely patent. Cf. Dorothy H. Marsh, 9 IBLA 113 (1973).

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

Edward W. Stuebing
Administrative Judge

We concur:

James L. Burski
Administrative Judge

Gail M. Frazier
Administrative Judge

