

Appeal from a decision of the California Desert District Office, Bureau of Land Management (BLM), cancelling public land sale CA-17184.

Reversed.

1. Federal Land Policy and Management Act of 1976: Sales-- Public Sales:
Generally--Public Sales: Cancellation

Under the provisions of 43 CFR 2711.3-3(d) and 43 CFR 2711.3-1(f) and (g), a direct sale of public land may not, as a general rule, be cancelled after BLM has accepted the tender of the purchase price.

2. Federal Land Policy and Management Act of 1976: Sales--
Public Sales: Generally--Words and Phrases
"Adjoining landowners." The term "adjoining landowners, as used in 43 CFR 2711.1-2(b), does not include individuals who own cornering lands, since in the administration of the public land laws the terms "contiguous" or "adjoining" have been consistently defined and construed to exclude "cornering" lands.

APPEARANCES: Henry J. Warmuth, pro se.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

Henry J. Warmuth has appealed from a decision of the California Desert District Office, Bureau of Land Management (BLM), dated September 11, 1986, cancelling the direct sale of a parcel of land, described as lot 3, sec. 26, T. 4 N., R. 15 W., San Bernardino Meridian, California, aggregating 4.90 acres and serialized as CA-17184. We reverse.

Prior to the sale involved herein, Warmuth had purchased lots 2 and 4 in sec. 36 from the Federal Government in 1959, and subsequently constructed a dirt access road across lot 3 connecting lot 2, which is immediately north of lot 3, with lot 4, which is immediately east of lot 3. This access road was admittedly constructed in trespass as title to lot 3 was, at that time, in the United States.

Warmuth apparently contacted BLM sometime in 1984 regarding the purchase of lot 3. Following an appraisal, by letter dated April 18, 1985, BLM informed Warmuth that it was prepared to sell the parcel to him at the appraised fair market value of \$ 100.

A notice of realty action (NORA), dated May 28, 1985, was filed by BLM with the Federal Register on May 31, 1985, giving notice, inter alia, that lot 3 would be offered to Warmuth via direct sale on August 3, 1985, under the authority set out at 43 CFR 2711.3-3. The NORA noted that the purpose of this sale was to dispose of public lands which, because of location, lack of administrative access, and/or existing private residential developments in the areas involved, made them difficult and uneconomic to manage as part of the public lands. The NORA further advised any interested parties to file comments with the District Manager within 45 days, noting that "[a]ny adverse comments will be evaluated by the California State Director, Bureau of Land Management, who may vacate or modify this action and issue a final determination." 50 FR 23362 (June 3, 1985).

BLM also mailed copies of the NORA, pursuant to 43 CFR 2711.1-2(b), to "adjoining private surface owners and existing/past land users of the subject public lands." BLM did not, however, send a copy of the NORA to Andrew M. Marcinko, the owner of lot 1 in sec. 26, which corners lot 3, being east of lot 2 and north of lot 4.

On June 25, 1985, Warmuth submitted the \$100 purchase price, together with the \$ 50 filing fee and proof of publication of the NORA in a local newspaper for the required three weeks. By decision dated September 16, 1985, BLM informed appellant that it had accepted his purchase payment and had so informed the public of this fact at its competitive land sale held on August 14, 1985, in Riverside. With [**4] this decision, BLM transmitted various forms which appellant was required to complete prior to the issuance of patent. These forms were duly completed and returned to BLM.

Subsequently, by letter dated October 21, 1985, the Acting District Manager advised Warmuth of the necessity of consenting to certain reservations relating to a pre-existing electrical right-of-way and of oil and gas deposits which would be included in the patent for the subject parcel and notified him that his consent thereto was necessary. On November 5, 1985, the District Office received Warmuth's written consent to these reservations.

On November 12, 1985, before patent could issue, BLM received a letter from Andrew M. Marcinko, who identified himself as the owner of lot 1, sec. 26. Marcinko argued that he presently had no viable legal access to his property and asked that the patent to lot 3 be impressed with a 33-foot right-of-way along its eastern boundary, which together with an existing 33-foot right-of-way along the western boundary of lot 4 would afford Marcinko with a combined 66-foot right-of-way, which Marcinko asserted was necessary to access his land given the steep terrain.

By letter dated December 6, 1985, the District Manager informed appellant of Marcinko's letter, noting that "[a]pparently his property is contiguous with a corner of the parcel of public land that we sold directly to you at appraised market value on August 13, 1985." The letter continued:

Mr. Marcinko insists that he did not receive word of our direct sale to you and, therefore, could not voice any objection or concern regarding the method of sale. As a neighboring landowner, he is entitled to appropriate notice of the sale. We inadvertently failed to send him a copy of the notice of realty action announcing our direct sale to you.

We are, therefore, obliged to correct that error by mitigating his concerns. It is likely that, had we known of his interest in the sale parcel, the sale method might have been changed from a direct, non-competitive sale to one requiring the submission of sealed bids, with the highest qualifying bid securing a purchase of the land. As you know, our decision to go the direct sale route was based on your predominate landownership in the vicinity of the parcel, including your control over physical access from the west. Another factor, was our decision to resolve [**6] the trespass of the public land created by the unauthorized road you constructed through the subject parcel.

Mr. Marcinko has indicated that he would not raise any objection or threaten litigation provided a reservation for a road right-of-way is included in the patent. He has expressed that his sole aim is to secure legal access to his land. It would appear that he might have a legal justification for his request under section 509(a) of the Federal Land Policy and Management Act of October 21, 1976 (43 U.S.C. 1769). The aforementioned statute provides that when it was passed, it did not terminate any right-of-way or right-of-use issued, granted or permitted under other statutes; i.e., Small Tract Act of June 1, 1938, as amended (43 U.S.C. 682[a]); Mr. Marcinko's existing parcel of land was sold under authority of the Small Tract Act. [Emphasis in original.]

Warmuth did not reply to his letter. On March 14, 1986, BLM wrote to him again, requesting a response. The case file includes a memorialization of a telephone conversation held on April 7, 1986, between a BLM representative and Warmuth in which appellant expressed his disagreement with Marcinko and his unwillingness to accept a patent to lot 3 impressed with the right-of-way which Marcinko sought.

Despite the fact that no agreement had been reached on the issue of the right-of-way for Marcinko, by memorandum dated May 7, 1986, addressed to the State Director, the District Manager requested preparation and issuance of a patent containing various reservations to which Warmuth had given his assent. A reservation for a right-of-way along the eastern boundary of lot 3, as requested by Marcinko, was not included.

By memorandum dated May 21, 1986, the State Director returned the case file to the District Manager for corrective action "based on two critical flaws." Thus, the State Director noted:

1. The NORA was never sent to an adjoining landowner, Mr. Marcinko. The regulation at 43 CFR 2711.1-2(b) requires such notice, and it seems particularly important in the case of a direct sale. Given the price of the parcel (\$ 100), and his interests in it, Mr. Marcinko might have wished to purchase it himself.

2. Mr. Marcinko wrote in comments which must be considered as being adverse to the sale as it is being consummated. Mr. Marcinko wants a road access easement to his adjoining property, and none is being provided. Under the circumstances of Mr. Marcinko not receiving the NORA, and since we are not making the conveyance subject to an access easement, Mr. Marcinko's comments constitute a protest.

Pursuant to this memorandum, the District Office informed appellant, by letter dated June 27, 1986, that it was unable to issue patent to lot 3 because Marcinko had not been properly notified of the proposal prior to the sale as required under 43 CFR 2710.0-6(c)(1)(iii). Noting that Marcinko's property "shares a contiguous corner with the subject sale parcel," the District Office concluded that the NORA had not been personally served on Marcinko as required by 43 CFR 2711.1-2(b). The District Office continued: "We regret that our previous public announcements did not reach all the appropriate adjoining land owners. Therefore, in order to correct our oversight and quiet his protest, we must recognize Mr. Marcinko's concerns and afford him the right-of-way he requested. To do this we need your consent." Accordingly, it informed Warmuth that he must accept a right-of-way reservation along the east border of lot 3, failing in which the District Office would cancel the sale, refund his purchase price, reappraise the property, and offer it for competitive bidding at a later date.

By letter received on July 17, 1986, appellant refused to agree to the easement proposed by the District Office, arguing that Marcinko's request was unreasonable and further contending that Marcinko had been offered access to lot 1 both by appellant and the landowner adjacent to lot 1 on the north and east, but that Marcinko had repeatedly failed to take advantage of such offers. He requested that the District Office reconsider the equities of the parties.

By decision dated September 11, 1986, the District Manager cancelled the sale of lot 3 to appellant and directed the return of the purchase money to him. 1/ The District Manager justified this course of action by

1/ Earlier, on July 25, 1986, the Area Manager had advised appellant that due to the problem concerning Marcinko's notification, BLM might not be able to issue patent to lot 3. It was suggested to appellant that, prior to the issuance of a decision voiding the sale, he apply for a right-of-way for the

referencing 43 CFR 2710.0-6(c)(1)(iii) and 43 CFR 2711.1-2(b), which "requires that adjoining landowners be informed about proposed land sales. Mr. Marcinko was not informed, an omission which denied him an opportunity to protest the sale." Since appellant refused to agree to the reservation requested by Marcinko, the District Manager concluded that he had no option but to cancel the sale. Warmuth duly filed an appeal from this decision.

On appeal, in addition to reiterating the arguments which he presented to BLM, appellant challenges BLM's assertion that Marcinko is an adjoining landowner, pointing out that Marcinko's property merely corners on lot 3 and does not abut it. Therefore, appellant contends that adequate notice, via publication in the Federal Register and in the local newspapers, was afforded to Marcinko.

[1] At the outset, we note that there exists substantial doubt whether, even if it were shown that Marcinko did not receive the notice contemplated by the regulation, BLM retained the authority to cancel the sale involved herein. As noted above, BLM conducted a direct sale under the authority of section 203 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1713 (1982). The implementing regulations covering direct sales are found at 43 CFR 2711.3-3. Of particular relevance, 43 CFR 2711.3-3(d) provides that "[a]cceptance or rejection of an offer to purchase the lands shall be in accordance with the procedures set forth in § 2711.3-1(f) and (g) of this subpart."

The referenced sections provide as follows:

(f) The acceptance or rejection of any offer to purchase shall be in writing no later than 30 days after receipt of such offer unless the offeror waives his right to a decision within such 30-day period. * * * Prior to the expiration of such period the authorized officer may refuse to accept any offer or may withdraw any tract from sale if he determines that:

- (1) Consummation of the sale would be inconsistent with the provisions of any existing law; or
- (2) Collusive or other activities have hindered or restrained free and open bidding; or
- (3) Consummation of the sale would encourage or promote speculation in public lands.

fn. 1 (continued)

road which he had constructed across lot 3 in order to protect his right to access his property "in the event the sale is cancelled and the land remains public domain." Such a course of action would have also guaranteed that any subsequent sale of lot 3 to a third party would have been made subject to the right-of-way. The case file before the Board bears no evidence that appellant ever formally applied for such a right-of-way.

(g) Until the acceptance of the offer and payment of the purchase price, the bidder has no contractual or other rights against the United States, and no action taken shall create any contractual or other obligations of the United States.

In the instant case, as discussed above, the District Manager duly notified appellant that his purchase of the property had been approved and his payment of the purchase price which BLM had established had been accepted. It seems clear that, under 43 CFR 2711.3-1(g), at that point in time, contractual rights vested in appellant. Cf. *Exxon Corp.*, 97 IBLA 330 (1987). Moreover, it is further open to question whether, even assuming that BLM was correct in its conclusion that the notification provided Marcinko was deficient under 43 CFR 2711.1-2(b), the District Office retained authority under 43 CFR 2711.3-1(f) 2/ to cancel the sale once it had formally accepted the purchase payment tendered by Warmuth. We need not reach this question, however, because, as we shall show, BLM was in error in its conclusion that Marcinko received inadequate notification of the proposed direct sale. 3/

[2] The basis of BLM's decision cancelling the direct sale was that by failing to obtain personal service on Marcinko, who it determined was an adjoining landowner, the sale procedures violated 43 CFR 2711.1-2(b). That regulation generally requires 60-day notification of various public officials prior to any sale. Of more relevance herein, the last sentence of that regulation further provides that "notice shall be sent to other known interested parties of record including, but not limited to, adjoining landowners and current land users."

The decision of BLM clearly proceeded on the assumption that, since Marcinko held property which cornered upon the sale parcel, he was an "adjoining landowner." In this conclusion, BLM erred. A number of provisions of both present and prior laws have granted preference or other rights to individuals who held land either "contiguous to" or "adjoining" Federal land. See, e.g., § 3 of the Act of February 20, 1920, 30 U.S.C. § 203 (1976); § 2 of the Unintentional Trespass Act, Act of September 26, 1968,

2/ To the extent that the provisions of 43 CFR 2711.3-1(f) apply to competitive sales they are essentially merely an amplification of statutory language appearing at 43 U.S.C. § 1713(g) (1982). As enacted, however, this provision clearly applies only to competitive sales. It was extended by rulemaking to embrace both modified competitive and direct sales. See 45 FR 39417 (June 10, 1980).

3/ We expressly reserve the question whether, under the statute or regulations as the case may be, BLM is precluded from rejecting an offer to purchase after either accepting that offer or allowing the appropriate period of time to elapse where it is subsequently discovered that the sale would be affirmatively prohibited by, as opposed to being merely inconsistent with, another statute. Clearly, if the Department were subsequently to discover that it did not own the land involved it could not issue a patent thereto, regardless of the provisions of 43 U.S.C. § 1713(g) (1982).

43 U.S.C. § 1432 (1970). Under such statutes, the Department has consistently held that "it is well established that 'cornering' [**15] land is not 'contiguous' or 'adjoining' land." Henry Petz, 62 I.D. 33, 37 (1955). Accord, The Kemmerer Coal Co., 5 IBLA 319, 322 n.6 (1972). There is no indication in the regulations that the adjective "adjoining" was being used in anything other than its traditional meaning. ^{4/} Thus, contrary to BLM's assumption, Marcinko was not an "adjoining" landowner and, therefore, the failure to effectuate personal service on him did not run afoul of the regulations.

We must conclude, therefore, that the failure of BLM to personally serve Marcinko with a copy of its NORA did not violate the provisions of 43 CFR 2711.1-2(b). We would point out, however, that this does not mean that Marcinko was not notified of the sale. On the contrary, the whole reason for requiring publication of the NORA in the Federal Register is to afford constructive notice to everyone not entitled to actual service of the BLM sale proposal. There is no question that such constructive notice was, in fact, given. Thus, based on our analysis of the record, there was no violation of 43 CFR 2711.1-2(b), and, accordingly, the decision cancelling the sale cannot be sustained.

Therefore, 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 reversed and the case files are remanded for further action consistent with this opinion.

James L. Burski
Administrative Judge

^{4/} So well established is this traditional interpretation that when Congress was enacting the 1978 amendments to the coal leasing program, the Department expressly recommended the inclusion of the phrase "or cornering" to 30 U.S.C. § 203 (1976), noting that, under the statute as then written only "contiguous" lands were eligible for addition to existing leases. See 1978 U.S. Code Cong. & Admin. News at 4747. Congress acceded to the Department's request and the phrase "contiguous or cornering" now appears in the statutory language. See 30 U.S.C. § 203 (1982).

ADMINISTRATIVE JUDGE HUGHES CONCURRING:

Although I join in Judge Burski's opinion, I do so with misgivings, because it appears to me that the United States did not receive a competitive price for the parcel sold here. Judge Burski correctly applies well-settled case law concerning "adjoining" lands to the Bureau of Land Management's (BLM's) present notice regulation and so correctly rules that BLM's direct sale of the parcel to Warmuth for \$100 may not be disturbed. However, I wish to express my opinion that a broader direct notice requirement expressly including cornering landowners would have ensured that BLM would have known of the existence of competing interest in the parcel. I feel it likely that, if such notice had been given here, the Government would have opened the sale to competitive bids or modified competitive bidding, and the amount received for the sale would have more likely represented its true value.

I note initially that the appraisal report on which BLM relied to set the purchase price of \$ 100 for the direct sale to Warmuth appears flawed. It describes the parcel as follows:

This is a very remote, landlocked and isolated 4.90 acre parcel situated some 12 miles southeasterly of the Santa Clarita River near Sand Canyon. Topography is steep sloping to steep. No physical or legal road access exists. Soils are sandy with numerous rock outcroppings. County zoning is HM for Hillside - this parcel has virtually no potential for any type of development due to its inaccessibility and physical ruggedness (a rocky knob). Elevation is at 3,600 feet. Because of its virtual nonutility a minimal lump sum land value of \$ 100 is the estimated fair market value for the parcel. [Emphasis supplied.]

Obviously, the area is accessible by road. Further, it has utility not only to Warmuth, but also to Marcinko. 1/ Had Marcinko's interest in the parcel been ascertained in advance of the direct sale to Warmuth, this apparent underestimate of the attributes of the parcels would likely have been redressed through the mechanism of the competitive bidding procedure or by modified competitive bidding. 2/

1/ Marcinko's letter of Nov. 8, 1985, indicates that he believed that part of lot 3 could be useful to him in gaining access to lot 1. Road rights-of-way running around the boundaries of Warmuth's lots 2 and 4 have evidently been reserved to the United States. This reservation creates the possibility that Marcinko could gain access to his lot 1 by securing a Federal right-of-way from lot 3 over the corner of lots 1, 2, 3, and 4 into lot 1.

2/ BLM recognized as much in its Dec. 6, 1985, letter to Warmuth, in which it observed that, "[i]t is likely that, had we known of [Marcinko's] interest in the sale parcel, the sale method might have been changed from a direct, non-competitive sale to one requiring the submission of sealed bids, with the highest qualifying bid securing a purchase of the land."

Section 203(f) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1713 (1982), provides:

Sales of public lands under this section shall be conducted under competitive bidding procedures to be established by the Secretary. However, where the Secretary determines it necessary and proper in order (1) to assure equitable distribution among purchasers of lands or (2) to recognize equitable considerations or public policy, including but not limited to a preference to users, he may sell those lands with modified competitive bidding or without competitive bidding. In recognizing public policy the Secretary shall give consideration to the following potential purchasers: (1) the State in which the land is located; (2) the local government entities * * *; (3) adjoining land owners; (4) individuals; and (5) any other person.

I read this provision as generally requiring BLM to sell lands under competitive bidding procedures, although, in identified circumstances, BLM may elect not to do so, but may instead sell the property directly or by modified competitive bidding. However, in deciding whether to forego competitive bidding, BLM is first required to nothing identify "potential purchasers," including, inter alia, any "individuals" or "any other person." 3/

A cornering landowner is, I feel, a logical candidate to purchase a parcel and is, therefore, an "individual" or "other person" who is a "potential purchaser" under section 203(f) of FLPMA, supra. His house might sit within feet of the parcel being sold, and he might well wish to purchase the property to avoid development. As in this case, it is possible that he might wish to attempt to gain access to his parcel across the corner. Accordingly, I feel that BLM should adopt a regulation that will ensure that it will be aware of any potential interest in purchasing the parcel by a cornering landowner. By so doing, it can better assess whether there would be "a number of interested parties willing to bid for the land," and whether the parcel should therefore be sold by competitive or modified competitive bidding. 4/

The present regulation, as correctly interpreted by Judge Burski, does not require service of actual notice of a proposed sale on cornering

3/ Indeed, we have previously held that competitive bidding procedures are mandated for public sales under section 203 of FLPMA, supra, unless equitable considerations or public policies indicate that modified competitive bidding or noncompetitive bidding procedures may be employed. Dean M. Anderson, 94 IBLA 88 (1986); see Luther D. Moss, 89 IBLA 171, 173-74 (1985). This is consistent with the Departmental policy set forth in 43 CFR 2710.0-6(c)(3)(i), implementing section 203(f) of FLPMA, supra, that competitive sale is the preferred method where there would be a number of interested parties. 4/ Under 43 CFR 2710.0-6(c)(3)(i), competitive sale is the general procedure for sales of public lands and may be used "where there would be a number of interested parties bidding for the lands" and, inter alia, the lands are accessible and usable.

land owners. I believe that, as a result, it fails to adequately identify potential purchasers as required by section 203(f) of FLPMA. Although the present regulation does provide for notice by publication, it may not accomplish the goal of identifying cornering landowners as potential purchasers, as publication is too likely to be missed. ^{5/} Accordingly, I feel that BLM should consider amending its regulations to provide cornering landowners with written notice of any proposed sale.

It should be noted that, even if a cornering landowner expresses interest in acquiring the parcel, BLM may still properly conclude that "equitable considerations or public policies" prevail that justify a direct sale. However, if all cornering landowners are notified, BLM's decision will certainly be more informed, and, I feel, the United States will be much more likely to receive a price for the lands sold that represents what the market will bring for them.

Additionally, I wish to comment on one procedural matter. BLM's decision cancelling the sale to Warmuth, from which this appeal arose, should have named Marcinko as an "adverse party" as contemplated by 43 CFR 4.413. An "adverse party" to an appeal is one who will be disadvantaged if the appellant prevails before the Board. Beard Oil Co., 105 IBLA 285 (1988). Clearly, Marcinko was an adverse party in Warmuth's appeal, since he might lose any possibility of securing a right-of-way across lot 3 if Warmuth were to prevail before us.

Under 43 CFR 4.413, an appellant is required to serve a copy of his notice of appeal and of any statement of reasons on each "adverse party" named in BLM's decision. The purpose of this requirement is to allow the adverse party the opportunity to defend the correctness of BLM's decision by filing an answer, as provided by 43 CFR 4.414. Although BLM failed to name him as an adverse party, Warmuth did serve a copy of his notice of appeal on Marcinko, who elected not to participate in this appeal. Thus, Marcinko has not been prejudiced here.

David L. Hughes
Administrative Judge

^{5/} I believe that notice by publication is, at best, a "hit or miss" proposition, and that it should be used as a last resort, for example, to attempt to provide notice to those whose potential interests are not subject to identification at the time a sale is proposed. A cornering landowner whose interest is duly noted on public land records does not fall into this category.

