

STATE OF CALIFORNIA ET AL.

IBLA 89-369

Decided October 28, 1991

Appeals from a decision of the State Director, California State Office, Bureau of Land Management, concluding that there is no Federal interest in certain land on the Bolinas Sandspit. CA CA 23521.

Affirmed as modified.

1. Rules of Practice: Appeals: Standing to Appeal

In order to establish standing to appeal under the provisions of 43 CFR 4.410, one must be a party to a case and must assert a cognizable interest which was adversely affected by the decision sought to be appealed.

2. Rules of Practice: Appeals: Standing to Appeal

The fact that a question may have been the subject of a prior Departmental decision will not prevent a party from establishing standing to appeal a subsequent decision to adhere to the prior precedent, where that party was not a participant in the prior decision.

3. Patents of Public Lands: Effect--Private Land Claims: Generally

Where the description of land in a patent issued under the Act of Mar. 3, 1851, 9 Stat. 631, differs from the description used in the decree of confirmation, the description in the patent controls over the description in the decree of confirmation, particularly where the initial Mexican concession was determined to be a grant of quantity rather than a grant of description.

4. Administrative Practice--Res Judicata--Rules of Practice: Appeals: Generally

Where a decision of the Acting Secretary of the Interior disclaiming any Federal interests in a parcel of land has stood unchallenged for over 80 years and subsequent development of those lands has occurred, at least arguably in reliance on this determination, the doctrine of administrative finality is properly invoked as a bar to readjudication of the conclusions reached by the Acting Secretary in his original decision.

APPEARANCES: Robert G. Collins, Esq., Deputy Attorney General, Los Angeles, California, for the State of California; Johanna H. Wald, Esq., and James Thornton, Esq., San Francisco, California, for the Natural Resources Defense Council, Inc.; Peter L. Townsend, Esq., San Francisco, California, for the Seadrift Association et al.; Edgar B. Washburn, Esq., Sean E. McCarthy, Esq., and Louis F. Claiborne, Esq., San Francisco, California, for the First American Title Insurance Company et al.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

The State of California, on behalf of itself, the California State Lands Commission, and the California Coastal Commission, and the Natural Resources Defense Council, Inc. (NRDC), have appealed from a decision of the California State Director, Bureau of Land Management (BLM), dated March 6, 1989. In his decision, the State Director declined to reconsider the September 9, 1904, decision of the Acting Secretary of the Department of the Interior, rendered in the appeal of John Lawler, affirming the rejection by the Commissioner of the General Land Office (GLO) of an application

to survey assertedly unsurveyed public lands located on an "arenal" or sand-spit in secs. 28, 29, 30, and 33, T. 1 N., R. 7 W., Mount Diablo Meridian, California, based on the conclusion of the GLO Commissioner that no Federal lands were described in the application for survey. This arenal is generally referred to as the Bolinas Sandspit. <sup>1/</sup>

The immediate genesis of the present controversy was an inquiry by the California Coastal Commission as to the possible Federal ownership of various lands on the Bolinas Sandspit. In 1983, the Seadrift Association, an association of various property owners on the westerly portion of the sandspit, constructed an emergency rip-rap seawall to protect against ocean waves. Thereafter, in 1987, the County of Marin, following the decision of the United States Supreme Court in Nollan v. California Coastal Commission, 483 U.S. 825 (1987), <sup>2/</sup> retroactively issued a coastal permit for the seawall, which action was then appealed by various individuals to the California Coastal Commission. In the course of its consideration of the matter, the Commission inquired of the California State Office, BLM, as to the possible Federal ownership of a strip of beach running the length of

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<sup>1/</sup> The spelling of the word "Bolinás" has varied considerably over the years. Thus, at different times it has been spelled "Baulines" or "Baulinas" or, more recently, "Bolinás." The text will use these variant spellings interchangeably, generally following the usage of the time period under examination. The one exception will be in references to the grant of the Rancho Las Baulines, in which case, unless it is part of a direct quotation, the spelling will reflect the title of the rancho as it appeared on the official plats of survey.

<sup>2/</sup> The Nollan decision involved a determination by the United States Supreme Court that the preconditioning of approval of certain permits on the grant of public-access easements was an unconstitutional taking where the condition of public access did not serve public purposes related to the permit requirement.

the sandspit in a narrow band, between and including a rock revetment and the ordinary high water mark of the ocean, comprising 36.305 acres. However, while this part of the beach consisted only of 36.305 acres, the total acreage of the sandspit is approximately 300 acres. As will be shown below, questions relating to the possibility of Federal ownership of the beach area necessarily implicate ownership of the entire sandspit. <sup>3/</sup>

Subsequent to the Commission's inquiry, representatives of Seadrift and various title companies which have insured titles to properties located on the sandspit <sup>4/</sup> apprised the BLM State Office of their interest and informed BLM of their view that no part of the sandspit was unpatented Federal land. Pointing to the decision rendered in the John Lawler appeal, these parties argued that millions of dollars had been spent in reliance upon the determination that the lands involved were not Federally owned. As noted above, on March 6, 1989, the California State Director issued his decision, declining to reconsider the factual predicates underlying the John Lawler decision, and the State of California and NRDC pursued this appeal.

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<sup>3/</sup> While we recognize that appellants have strenuously argued that the only matter under appeal is the Federal ownership of the beach area adjacent to the Seadrift development and not the adjoining uplands or any other land on the sandspit (see State of California's Additional Statement of Reasons (SOR) at 2-3), the simple fact of the matter is that the theory upon which the appeal is based would require, at a minimum, an initial finding that no part of the sandspit was ever conveyed or confirmed by the United States.

<sup>4/</sup> The title insurance companies involved are First American Title Insurance Company, the Commonwealth Land Title Insurance Company, Ticor Title Insurance Company of California, Chicago Title Insurance Company, Fidelity National Title Insurance Company, Transamerica Title Insurance Company, and Title Insurance Company of Minnesota. These appellees will be referred to jointly as the "Title Companies."

We note initially that Seadrift and the Title Companies have submitted a number of procedural challenges to the appeals of the State and NRDC. Adjudication of some of these matters, however, requires considerable knowledge of the historical framework from which the present appeal arises. Accordingly, we will limn the history of the sandspit as well as the adjoining uplands. While the length of this description might seem to betoken that the outline is in great detail, we recognize that, in reality, our factual recitation merely scratches the surface of a tangled and complex record.

The starting point for an understanding of the problems contained in this appeal rests in the 1848 Treaty of Guadalupe Hidalgo, which ended the Mexican War. Under this Treaty, the United States acquired a vast territory from Mexico, stretching from the Texas border to the Pacific Ocean, including all of the present State of California. Pursuant to Article VIII of the Treaty, 9 Stat. 929-30, the United States bound itself to recognize both Spanish and Mexican titles to land within the newly acquired territories. In fulfillment of this obligation, Congress adopted the Act of March 3, 1851, 9 Stat. 631, establishing a three-member Board (ultimately known as the Board of Land Commissioners) for the purpose of adjudicating land claims within the State of California, with an initial term of 3 years. Claimants were afforded a 2-year period in which to present their claims. Appeals from the decisions of the Board of Land Commissioners could be taken to the District Court for the district in which the land was situated and thence to the United States Supreme Court.

In making decisions under this Act, section 11 noted that adjudications "shall be governed by the treaty of Guadalupe Hidalgo, the law of nations, the laws, usages, and customs of the government from which the claim is derived, the principles of equity, and the decisions of the Supreme Court of the United States, so far as they are applicable." Section 13 of the Act provided, in relevant part, that:

[F]or all claims finally confirmed by the said commissioners, or by the said District or Supreme Court, a patent shall issue to the claimant upon his presenting to the general land office an authentic certificate of such confirmation, and a plat or survey of the said land, duly certified and approved by the surveyor-general of California, whose duty it shall be to cause all private claims which shall be finally confirmed to be accurately surveyed, and to furnish plats of the same \* \* \*.

Thereafter, Congress adopted a number of amendments to the provisions of the Act of March 3, 1851, supra. Two of these extended the term of the Board of Land Commissioners to permit it to adjudicate claims made under the Act of March 3, 1851 (see Act of January 18, 1854, 10 Stat. 265; Act of January 10, 1855, 10 Stat. 603), while another extended the time for submission of land claims by specified claimants (see Act of February 23, 1854, 10 Stat. 268).

Of more direct pertinence to the issues presented by this appeal, however, were the provisions of the Act of June 14, 1860, 12 Stat. 33. This Act required the publication of surveys of private land claims in California in the manner prescribed and further provided that the surveys could be ordered returned into the district court upon the objection of any interested party. Upon being ordered into court, testimony could be taken

thereon and the court was authorized, upon a finding that the survey was erroneous, to annul or correct and modify the survey. Section 5 of the Act further provided that "said plat and survey so finally determined by publication, order, or decree, as the case may be, [5/] shall have the same effect and validity in law as if a patent for the land so surveyed had been issued by the United States." Finally, section 6 of the Act provided:

That all surveys and locations heretofore made and approved by the surveyor-general of California, which have been returned into the said district courts, or either of them, or in which proceedings are now pending for the purpose of contesting or reforming the same, are hereby made subject to the provisions of this act \* \* \*.

The Act of June 14, 1860, supra, was repealed by the Act of July 1, 1864, 13 Stat. 332. In effect, this statute vested the original authority to approve or disapprove surveys completed by the surveyor-general in the Commissioner of the GLO, and provided for an appeal from his decision to the district courts and thence to the circuit courts. Under section 3 of this Act, it was expressly provided that whenever a new survey was ordered, such survey of the surveyor-general would be under the supervision of the Commissioner of the GLO and not the district or circuit courts. Section 2 of the Act, however, granted the district courts the authority to continue with any proceedings with respect to the correction or confirmation of a survey pending before the court as of the date of the adoption of the Act.

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5/ Publication of the plat of survey was final where no application was made to the district court, while the order was final where the district court declined to accept the application for review. In those cases in which the district court accepted review, the court's decree, whether accepting the original survey or reforming it, was the final action.

While the foregoing describes the shifting legal framework which guided adjudications of land claims in California, it is also necessary to understand the practices of the Mexican government with respect to land grants, since these were the "laws, usages, and customs of the government from which the claim is derived" which were required to be taken into consideration in the adjudication of these claims. In brief, the process was commenced by the filing of an application with the governor, alleging compliance with the requirements of Mexican law. This initial filing was required to be accompanied by a diseño, or sketch, of the land sought. An espediente, the collection of relevant papers in the nature of a case file, would be established and the governor would cause an investigation to be made of the application and of its conformity with the statutory authorization and the implementing regulations. Upon a determination that compliance was shown, a concession or grant by the governor would issue and the perfected espediente would be transmitted to the Departmental Assembly for its approval. <sup>6/</sup>

Thereafter, under the Mexican procedures, the claimant would obtain juridical (also called judicial) possession. This was a process in which

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<sup>6/</sup> The Departmental Assembly consisted of seven members chosen by electors qualified to vote for deputies to the general Congress. See United States v. Osio, 64 U.S. (23 How.) 273, 285 (1860). If the Departmental Assembly disapproved a grant, it was the duty of the governor to transmit the grant to the supreme executive government for its final decision. It was early held, however, that once the governor had made the grant, the failure to transmit it to the Departmental Assembly, or, upon rejection by the Departmental Assembly, to transmit it to the supreme executive government, did not vitiate the subsisting rights of the grantee with the result being that such titles held by the grantee were sufficient for confirmation under the 1851 Act. See United States v. Reading, 60 U.S. (19 How.) 1, 7-8 (1856).

the grantee, in the company of the adjacent landowners and a Mexican magistrate, normally the alcalde or one acting on his behalf, traversed the boundaries of the granted land. While the delivery of juridical possession was not essential for the validity of the grant (see, e.g., Fremont v. United States, 58 U.S. (17 How.) 542, 563 (1855)), it was of some importance in determining whether the grant was sufficiently definite as to be judged a grant of the entire premises described or was, alternatively, merely a grant of a quantity of land within larger limits. Thus, it was generally held that where juridical possession was given, the land so circumscribed passed as a grant in its entirety, regardless whether it contained more or less land than that enumerated in the grant. See Arguello v. United States, 59 U.S. (18 How.) 539, 545-46 (1856).

On the other hand, in the absence of delivery of juridical possession or of a description by metes and bounds or some other means by which a confirmation of the boundaries of the grant were indicated, grants of a specified quantity of land within a much larger tract were construed, consistent with Mexican law, as limited to the amount so specified, which the claimant could select subject to the control of the United States, <sup>7/</sup> with the

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<sup>7/</sup> In Fremont v. United States, *supra*, the Court noted that under the Mexican procedures, the government retained the absolute right to fix the location of a quantity grant of land within the boundaries mentioned in the grant. In United States v. McLaughlin, 127 U.S. 428, 456 (1888), the Supreme Court expressly held that within such larger areas, Congress retained the power to grant lands to others, even during the pendency of Mexican land claims, so long as sufficient acreage remained so as to satisfy the Mexican grant. In point of fact, however, the United States generally permitted the grantee to select the land desired in such circumstances, subject to the caveat that the selection be compact and include, to the extent practicable, lands actually occupied by the grantee and any lands which had been conveyed by a grantee to a third party. See United States v. Pacheco, 69 U.S. (2 Wall.) 587-88 (1865).

remainder, or sobrante (see Rancho Mission De La Purisima, 1 L.D. 248 (1882)), being reserved to the nation, originally Mexico and, thereafter, the United States. See, e.g., United States v. Sepulveda, 68 U.S. (1 Wall.) 104, 108 (1864); United States v. Fossat, 61 U.S. (20 How.) 413, 426-27 (1858). This last point is of relevance herein, since the grant of the Rancho Las Baulines, upon which appellees base much of their claim to ownership of the sandspit, was ultimately determined to be a grant of quantity and the land conveyed was limited accordingly.

Having briefly outlined the relevant legal considerations which generally guided adjudication of Mexican land claims, we turn now to the historical record relating to the grant of the Rancho Las Baulines to Gregorio Briones and, to a lesser extent, the grant of the Rancho Saucelito, immediately to the southeast. <sup>8/</sup> In October 1841, Briones presented a petition to Salvador Vallejo, Military Commander of the Northern Frontier, seeking a grant of lands which aggregated a little more or less than two square leagues, <sup>9/</sup> which land, Briones stated, bordered on the rancho of Don Rafael Garcia and Don Guillermo (William) Richardson, and he noted, also

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<sup>8/</sup> The history of Briones' grant is generally taken from the "Transcript of Las Baulines Rancho Confirmation Proceedings" submitted by the State of California with its Additional SOR. As numbered at the bottom of the page, this document consists of 165 pages. While we recognize that there is some argument among the parties concerning the precise transcription of some of the documents appearing therein (see, e.g., Response of the Title Companies, Exhs. 11 and 12), these disputes do not substantially affect the history as set forth in the text. For convenience, citations to the transcript will be "Tr." followed by the page number shown at the bottom of the page. Where the transcription has been disputed or the record is unclear, we have referred to both the transcription provided by the State of California and the copies of the documents submitted by the Title Companies, as well as the copy of the transcription which is found in the case file.

<sup>9/</sup> A league was a unit of measurement used in Mexico with a value equal to 5,000 varas. The vara, however, had a varying value. In California, the

bordered the "coasts" of the Pacific Ocean. Vallejo granted permission for Briones to occupy the land pending approval of the request by the governor.

Briones then presented his petition to the Prefect of the 1st District of California who forwarded it to Pio Pico, then governor of California. Accompanying this petition was a diseño which, we note, clearly showed the arenal or sandspit within the limits of the land sought, nearly enclosing an area identified as an estuary and lagoon ("Estero y Laguna"). See, e.g., State of California's Additional SOR, Map No. 3; Title Companies' Answer, Exh. B. On February 11, 1846, Pio Pico granted Briones the land, identified as "Rancho de las Baulenos" located within "boundaries of Wm. Richardson, Garcia, the Sierra and the Sea" (Tr. 38). 10/ Three conditions were attached to this grant. The first allowed him to enclose it, so long as he did not interfere with existing roads, paths, and servitudes. 11/ The second condition required Briones "to solicit of the proper justice to give juridical possession" of the land. 12/ While the third condition

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fn. 9 (continued)

vara was considered to measure exactly 33 inches. Thus, a square league in California totalled 4,340.278 acres. See United States v. Perot, 98 U.S. 428, 431-32 (1879). But see The 1858 General Instructions for the Surveying of Land Claims in California, State of California's Additional SOR, Exh. 7A at 2-3, determining the value of the vara as "33 372/1000 English inches," and thus a judicial square league would contain 4,438.683 acres.

10/ The grant from Pio Pico had been translated for consideration by the Board of Land Commissioners in their deliberations. Unfortunately, this translation is no longer completely legible. See Title Companies' Response, Exh. 12. There are, accordingly, gaps in the translation.

11/ The translation submitted by the State of California shows this condition as "[h]e may enclose it without pre\_\_ing the roads, paths, and servitudes" (Tr. 38). Our review of the Title Companies' Exh. 12 convinces us that the missing word is "prejudicing." See also Summa Corp. v. California, 466 U.S. 198, 201 n.1 (1984).

12/ The translation provided by California, viz., "solicit to the proper justice to give judicial possession," has been corrected according to our review of the actual text of the translation at Title Companies' Exh. 12.

cannot be translated in its entirety with absolute certainty, it clearly provided that the grant was of two square leagues and further provided that the justice giving juridical possession was directed to leave the surplus remaining reserved to the government. 13/

On January 31, 1853, Briones filed his claim with the Board of Land Commissioners. This document noted that the boundary began at the ocean and continued along the northwest line of the Rancho Saucelito, owned by William Richardson (Tr. 1). A number of supporting documents were thereafter submitted. In an affidavit dated February 14, 1854, Richardson stated that "juridical possession was given by the proper officer to the said claimant about the year 1841" (Tr. 7; Title Companies' Response, Exh. 14). Other testimony indicated that Salvador Vallejo had authorized the grant of possession and that this was accomplished by riding the boundaries on horseback. See Deposition of Antonio Ortega, Tr. 11-15. All of the testimony presented was to the effect that the land claimed aggregated roughly two square leagues. See, e.g., Tr. 7, 13, 21.

By order filed August 15, 1854, the Board of Land Commissioners entered a decree of confirmation. The land confirmed was described as follows:

Bounded on the northwest by the place called Cañada Serro known as the land of Rafael Garcia; on the southeast by the place called Saucelito known as the rancho of William A. Richardson;

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13/ A review of the documents indicates that this provision should be translated as "The land which has been mentioned is of two Square leagues, a little more or less. The Justice who may give possession will have it used conformably to ordinance, leaving the surplus which may remain to the nation for convenient uses."

on the northeast by the ridge or mountains known by the name of Temalpais running southeast and northwest, and on the southwest by the Pacific Ocean, containing two square leagues of land more or less; reference to be had also the grant and to the map connected with the traced copy of the Expediente, both of which are filed in this case.

(Tr. 43; Title Companies' Response, Exh. 16).

It is of some importance to note that the opinion of the Board which was reported the same day, expressly noted that no delivery of juridical possession had occurred 14/ but concluded that "the boundaries are fully described and the measurements are of such a character that with the aid of the map and even without it, there would seem to be no difficulty in locating and running out the premises with accuracy" (Tr. 41). Arguably, this might constitute a finding that sufficient evidence existed, even in the absence of juridical possession, to qualify the grant as one of description rather than quantity. However, the legal import of such a finding was undermined by the next sentence, wherein the opinion noted that "[t]he testimony of the witnesses concur in proving the quantity of land within the limits defined and does not exceed the two square leagues granted by the Governor." Id.

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14/ We set forth above the statements of Richardson and Ortega asserting that juridical possession had been delivered. The conclusion of the Board of Land Commissioners on this point, however, seems clearly correct. Under Mexican procedures, juridical possession was delivered only after the concession. See, e.g., United States v. Reading, supra; Fremont v. United States, supra. Indeed, the concession issued by Pio Pico clearly presupposed that delivery of juridical possession would occur subsequent to the grant. Since both Richardson and Ortega testified to activities occurring in 1841, these actions could not be seen as delivery of juridical possession because the concession was not approved by Pio Pico until 1845.

Thereafter, the United States pursued an appeal to the District Court for the Northern District of California, as provided by the Act of March 3, 1851, supra. On January 19, 1857, District Judge Ogden Hoffman affirmed the decision of the Board of Land Commissioners (Tr. 50-51). No appeal was taken from this decision. While the failure of the United States to pursue an appeal from Judge Hoffman's decision made the confirmation of the grant final (see United States v. Throckmorton, 98 U.S. 61, 64-69 (1879)), the issuance of a patent thereto was committed by section 13 of the Act of March 3, 1851, to the GLO upon receipt of a survey duly certified and approved by the surveyor-general of California. Before turning to the problems which arose within the surveying and patenting process, however, it is useful to make a brief reference to the claim filed by William Richardson for the Rancho Saucelito.

At about the same time that Gregorio Briones made his original request to the Mexican authorities for a grant of the lands which he occupied, William Richardson, who lived on the land immediately southeast of the Rancho Las Baulines, filed his request for a concession of the land which he was occupying and which he referred to as the Rancho Saucelito. The *diseño* which he filed with his request, however, appeared to show the entire southern tip of the arenal within the limits of Richardson's claim (State of California's Additional SOR, Map No. 4). <sup>15/</sup> Richardson's request for a concession was eventually granted and subsequently recognized by the Board of Land Commissioners.

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<sup>15/</sup> The Title Companies, while admitting that two copies of the *diseño* for the Rancho Saucelito seem to place the foot of the arenal within that rancho, suggest that another *diseño* "appears to contradict the others on this point" (Title Companies' Answer, Exh. A at 44).

In March of 1858, Deputy Surveyor William J. Lewis surveyed the Rancho Saucelito. This survey traced the boundaries of the Saucelito grant beginning at the northeast corner of that grant proceeding southeast to Saucelito Bay, then proceeding along the shore of San Francisco Bay, through the Golden Gate and northwest up the Pacific Coast. Of particular relevance herein, is the northwest corner of the survey. He established this corner with a stake marked "S 58." <sup>16/</sup> His notes explained his reason for locating the corner at the point chosen:

Captain J. A. Morgan, the proprietor of the part of the Briones Rancho adjacent to the Saucelito Rancho being notified in writing met me on the ground and pointed out the above mentioned corner where there was a large pole planted and surrounded by a barrel of sand as the point of division on the Pacific Ocean between the two Ranchos which had been established when the Judicial Possession of the Saucelito Rancho was given & which had been so recognized by the adjoining proprietors from that date to the present time. [Emphasis supplied.]

State of California's Additional SOR, Exh. 6 at 4.

Lewis' field notes then state that he left the shore of the Pacific Ocean on a bearing of N. 55-1/4° E. for a distance of 101 chains, where he marked an oak at "a corner of the Briones Rancho." The explanation of how he was able to find a corner of the adjacent rancho which had not yet been surveyed can be found at the end of his field notes. Lewis noted that

[t]he line from the head of the before named Arroyo to the shore of the Pacific Ocean corresponds with the old established line of

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<sup>16/</sup> The survey instructions for private grants directed that the corners be numbered in succession and be preceded by the initial letters of the Rancho being surveyed. See State of California's Additional SOR, Exh. 7.

Judicial possession [17/] given to Mr. Richardson and was run in the presence of Capt. J. A. Morgan, the proprietor of that part of the Rancho of Briones adjoining the Saucelito Rancho, and is agreed to by him.

Id. at 5. The plat of survey depicting the results of the survey of the Saucelito Rancho clearly located the sandspit, or "sand beach" as it was thereon described, within the limits of the Briones Rancho. See State of California's Additional SOR, Map No. 2, and Appendix B attached hereto.

The survey of the Rancho Las Baulines was conducted by Deputy Surveyor Robert C. Matthewson in October 1858. 18/ In the course of his survey, Matthewson discovered that the area within the boundaries described by the grant from Pio Pico encompassed nearly four leagues, rather than the two leagues called for in the grant. See State of California's Additional SOR,

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17/ While the record before this Board does not contain a transcript of the espediente and other documents considered by the Board of Land Commissioners in their adjudication of the Richardson claim to the Rancho Saucelito, it is clear that the adjudication proceeded on the assumption that Richardson had obtained juridical possession. Indeed, in its later challenge to the survey of the Briones grant, the United States asserted that the line of juridical possession of the Saucelito grant was actually further north than was surveyed by Lewis and encroached upon the southeastern boundary of the Las Baulines grant as surveyed by Matthewson. See Seadrift Reply, Exh. 19. Subsequently, however, the United States sought to invalidate the patent which had issued to the Rancho Saucelito on the ground that it was based on fraudulent misrepresentations including the assertion that delivery of juridical possession had taken place. This attempt to invalidate the patent was rejected by the Supreme Court in United States v. Throckmorton, supra, which noted, inter alia, that delivery of juridical possession was not essential to the validity of a Mexican concession. In any event, the finding that Richardson obtained juridical possession is not necessarily inconsistent with the finding that Briones had not done so since the 1841 activities upon which Briones relied as constituting delivery of juridical possession did not include a "survey" of the Rancho Saucelito. See Tr. 14.

18/ While this was the first official survey of the Rancho Las Baulines, an earlier private survey had been made in 1854 by Bernard Carter. See Tr. 72-78.

Map No. 5; Seadrift Reply, Exh. 18a. Concluding that the Las Baulines grant was one of quantity rather than description, Matthewson, in accordance with the standard surveying instructions, approached Briones and offered him an opportunity to select the part which he wished confirmed. While he objected to this limitation, Briones' choice was a division of the land along a line commencing at the head of Baulines Bay and proceeding in a generally northwesterly direction almost to the boundary of the original area surveyed and then westerly to the Pacific Ocean. 19/ The effect of this choice would have been to relinquish all lands on the eastern side of Baulines Bay.

Matthewson, however, refused to agree with this selection, noting that it failed to include substantial areas of land east of Baulines Bay which Briones had already conveyed to third parties. See Tr. 83. Therefore, under instructions of J. W. Mandeville, Surveyor-General, Matthewson changed the selection to include all of the land surrounding Baulines Bay and to exclude all land in the northwestern half of the area included within the descriptive limits of the grant. 20/

The field notes of this survey indicate that Matthewson commenced his survey at the head of Baulines Bay and proceeded south along the western edge of the Bay, along the Pacific Ocean, thence northeast along the boundary of the Rancho Punta de los Reyes (Sobrante) and continuing along the

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19/ The area which Briones selected is depicted on the State of California's Additional SOR Map No. 5 and was described by Matthewson in his testimony taken when the survey was ordered into court. See Tr. 83.

20/ Part of the land excluded by Matthewson from the Rancho Las Baulines was apparently added to the Rancho Punta de los Reyes (Sobrante) as Addition A, and the other part was included in the patent to the Rancho Tomales y Baulines. See Title Companies' Response, Exh. 9.

south boundary of the Rancho Tomales y Baulines to the west boundary of the latter Rancho (its general shape being an inverted "L"), and proceeding along that boundary to the northwest boundary of the Rancho Saucelito where he set a corner post marked B.XVIII. At this point, the field notes recite that Matthewson descended down a grassy spur a distance of 119 chains: "To the shore of Baulines Bay, opposite a long Sand Bar or 'Arenal' whose general course is N. 60 W. slightly curving to the left. Here I set a Post marked T.B. 208. Thence up the shore of Baulines Bay, at ordinary high tide mark" (State of California's Additional SOR, Exh. 5 at 5). 21/

Whether Matthewson actually resurveyed the entire area ultimately patented to Briones is certainly an open question. In his subsequent testimony before Judge Hoffman, Matthewson noted that "[u]pon making this survey," presumably the original survey, he realized that the exterior boundaries contained four rather than two leagues (Tr. 82). He then consulted with Briones who elected to receive a tract of land generally to the west and northwest of Baulines Bay. The courses and distances for both the survey of the entire tract and the line of division chosen by Briones are shown on Map No. 5, State of California's Additional SOR. Thereafter, Matthewson testified, as noted above, that a number of individuals who had

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21/ The field notes submitted by the State of California were taken from those submitted to the California courts in the course of the litigation which resulted in Curtis v. Upton, 175 Cal. 322 (1917). The assertion in the field notes that Matthewson set post T.B. 208 is difficult to credit. Inasmuch as the survey instructions required that all posts be monumented by successive numbers preceded by the initials of the Rancho being surveyed (a requirement otherwise observed by Matthewson), we must agree with appellees that it is likely that Matthewson merely recovered and did not set post T.B. 208, and it is certainly possible, as appellees suggest, that this post represents a corner of an earlier, ultimately rejected, survey of the Rancho Tomales y Baulines, which lay to the northwest of the Rancho Las Baulines.

purchased land from Briones which was not within the area of his selection complained to Mandeville, who then "instructed [Matthewson] to change the survey and make it as returned to the Surveyor General and approved by him, partly on the Southwest and partly on the Northeast of Baulinas bay, as indicated by the deep red lines on the official plat" (Tr. 83). From the foregoing, one would logically assume that the northwest line of the land patented to Briones was surveyed after the survey of the exterior limits of the land described in the grant by Pio Pico. In point of fact, however, this is not what the field notes disclose.

The field notes indicate that the survey was commenced on October 12, 1858, pursuant to instructions issued on September 22, 1858. The survey commenced from the head of Baulinas Bay proceeding along its southwesterly shore to the mouth of the bay. The field notes then recount the balance of the survey of the southwestern area of the grant along the shoreline of the Pacific Ocean and report that by October 13, 1858, Matthewson's party had reached the Arroyo "Honda." The next day, the survey moved up the gulch of the arroyo, leaving the Pacific Ocean and proceeded on a straight line N. 46-3/4° E. a total of 300.64 chains to an oak which had also been noted on the northwestern line of the original plat of the four-league survey. The following day, Matthewson's notes recite, he proceeded down this line, in effect retracing the line as shown on the initial four-league survey plat, 22/ continuing, over the next few days, to the point of beginning which was reached on October 20, 1858. Thus, if Matthewson's notes are to

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22/ Indeed, the courses and distances from Station 22 to Station 57 (the point of beginning) on the final plat are verbatim replications of the calls from Station 36 to Station 71 shown on the original plat.

be believed, he surveyed all except the northwestern boundary of the land granted to Briones twice: the first time when he discovered that the calls of the grant embraced four leagues and the second time after Mandeville rejected Briones' selection of the parcel he desired.

We think it singularly unlikely that the field notes accurately por-tray the sequence of events. Not only is it unlikely that Matthewson would resurvey those boundaries which were not being altered, if for no other reason than it is questionable whether he would have been paid to do so, but also the fact of the matter is that had he actually resurveyed all of the boundaries he would have been required to obliterate markings on the posts along the northeastern and southeastern lines abutting the Rancho Tomales y Baulines and the Rancho Saucelito, since a number of posts were clearly set on the initial four-league survey and would have had inconsistent markings. Compare State of California's Additional SOR, Map No. 5 with State of California's Additional SOR, Map No. 1. Nor is it possible that Matthewson had earlier surveyed the northwestern line of the final survey in the course of running the four-league survey since he clearly testified that it was not until various individuals protested that Mandeville instructed him to "change the survey" (Tr. 83). Thus, the field notes are, at best, viewed as an amalgam of two different surveys, though we must admit that it is also possible that the northwestern boundary shown on the final plat of survey was never actually surveyed on the ground. However, while this is not an insignificant problem, it does not directly bear on corner T.B. 208 which is the focal point of the instant controversy.

In any event, the plat of final survey was approved by Mandeville on December 3, 1859. See Appendix A attached hereto. It is important to note that, though the plats of both the initial four-league survey and the final survey, which served as the ultimate basis for the patent to Briones, show an exclusion of the arenal, the first plat clearly indicates that the base of the arenal is adjacent to land within the limits of the Rancho Baulines, while the final plat places the arenal's base distinctly to the south of the southern line of the survey and shows the arenal as within the Rancho Saucelito. Compare State of California's Additional SOR, Map No. 5 with State of California's Additional SOR, Map No. 1.

On June 21, 1859, prior to the approval of the final survey by Mandeville, counsel for Briones sought an order from Judge Hoffman returning the survey to his court (Tr. 55). Thereafter, individuals claiming under grants from the Rancho Tomales y Baulines sought to intervene in the proceedings, alleging that the survey of the Briones claim was erroneous and conflicted with their rights (Tr. 56). On August 27, 1860, Judge Hoffman ordered the survey into court (Tr. 59). 23/

It is clear from the record of the proceedings, that the survey initially before Judge Hoffman was the survey depicted on Map No. 5 of the

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23/ In their original Answer, the Title Companies suggested that the ultimate approval of the final survey by Judge Hoffman was of no effect. See Title Companies' Answer at 10. This argument, however, was essentially abandoned in their subsequent response. See Title Companies' Response at 21-22. In any event, it seems clear to us that the provisions of section 6 of the Act of June 14, 1860, supra, cured any jurisdictional deficiency which might have existed with respect to the original request to return the survey to court and that nothing in United States v. Sepulveda, supra, is to the contrary.

State of California's Additional SOR, showing both the original boundaries as containing four leagues and the subsequent division on which Mandeville insisted. See Tr. 112. Indeed, this map contains Judge Hoffman's signature approving it, dated August 1, 1864. Subsequent proceedings were then had, at the request of one of the intervenors, in which Judge Hoffman approved the official survey on file in the GLO, as depicted on Map No. 1 of the State of California's Additional SOR, showing only the two-league tract. Judge Hoffman signed this map on August 31, 1865, and amended his earlier order to conform to this survey. A patent for the land, as described in the final survey, issued on January 9, 1866.

The final plats of the Rancho Saucelito and the Rancho Las Baulines vividly illustrate the core of the problem before the Board. Thus, the plat of the Rancho Saucelito places the arenal within Rancho Las Baulines and locates the supposed common corner on the shore of the Pacific Ocean. The plat of the Rancho Las Baulines, on the other hand, locates the arenal within the Rancho Saucelito and locates the common corner on the shore of Baulines Bay. Yet each also shows the other rancho as directly abutting its boundaries. And, as shown above, a review of the field notes establishes that this problem is not merely the result of erroneous mapping. On the contrary, the field notes of the Saucelito survey explicitly call for a corner on the Pacific Ocean, while the field notes for the Baulines survey are equally clear in calling for a corner on Baulines Bay, inside the arenal. Thus, paradoxically, while the original diseños of Rancho Saucelito and Rancho Las Baulines indicated an overlap in the area of the arenal, the actual surveys seemingly created a hiatus.

We note that appellees argue at length that any hiatus created was at total odds with the Mexican grants, since each grant was described in relationship to the other. With respect to the grant of the Rancho Las Baulines, appellees point out that the land as originally requested by Briones bordered the "ocean" and that the concession granted by Pio Pico referenced the "Sea." Moreover, the diseño which accompanied the Briones' request clearly included the arenal within the area sought. Thus, appellees contend, since the Board of Land Commissioners confirmed the grant awarded to Briones, a decision affirmed by the District Court, and in that this grant embraced the arenal in question, the failure of Matthewson to survey this arenal as part of the grant was an obvious error. 24/

Appellants argue, for their part, that regardless of the reason for the failure of the Matthewson survey to include the arenal, the simple fact of the matter is that neither the survey nor the patent which ultimately issued included the arenal and, therefore, the arenal did not pass with the patent. Conceding that the survey might have been subject to correction in a direct appeal, appellants point out that not only did Briones not object to the exclusion of the arenal in the proceedings before Judge Hoffman, but also that Judge Hoffman expressly approved the survey in 1865 and that

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24/ Appellees assail, correctly we believe, the argument made by the State of California that the arenal was excluded because Matthewson determined that the grant in question was one of quantity rather than description. As appellees point out, the original plat of survey which showed the land covered by the description in the grant also excluded the arenal. See State of California's Additional SOR, Map No. 5. As the reduction of the area described in the concession occurred subsequent to the running of this survey, it is clear that Matthewson excluded the arenal not because its inclusion would add excess acreage to the Briones grant but because he believed that it was not within the limits of the grant.

the patent thereafter issued in conformity therewith. Relying both on section 15 of the Act of March 3, 1851, supra, 25/ and subsequent decisions of the United States Supreme Court (e.g., Summa Corp. v. California, 466 U.S. 198 (1984); Dominguez De Guyer v. Banning, 167 U.S. 723 (1897)), appellants argue that the patent issued is conclusive as to the lands conveyed. 26/

Leaving aside, for the moment, the various contentions of the parties, it is necessary to note certain subsequent events which affect, critically we believe, the issues before the Board. Commencing in 1864, even before the issuance of the patent for either the Rancho Las Baulines or the Rancho Saucelito, 27/ a series of tideland surveys (TLS) were performed which

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25/ Section 15 provided

"[t]hat the final decrees rendered by the said commissioners, or by the District or Supreme Court of the United States, or any patent to be issued under this act, shall be conclusive between the United States and the said claimants only, and shall not affect the interests of third persons."

26/ Appellants criticized the decision of the State Director for its reliance on the Department's decision in Rancho Corte de Madera del Presidio, 1 L.D. 232 (1882), which had stated that the decision of the Board of Land Commissioners or, if an appeal were taken, the courts was binding on the Department and any subsequent survey of the land confirmed "becomes a mere ministerial act, requiring only practical knowledge and skill, without any discretion whatever in the officer who performs the service." Id. at 239. Appellants note, correctly, that no patent had issued in that case. Nor had a patent issued in Stewart v. United States, 316 U.S. 354 (1942), also cited by appellees. This fact, appellants argue, critically distinguishes those precedents from the case before the Board. See United States v. Sepulveda, supra at 109 ("If the survey does not conform to the decree of the board, the remedy must be sought from the Commissioner of the General Land Office before the patent issues \* \* \*"); United States v. Peralta, 99 Fed. 618, 631 (N.D. Cal. 1900), citing Chipley v. Farris, 45 Cal. 527, 538 (1873) ("The patent purports to convey the lands described in the survey, and its scope cannot be extended, nor on the other hand, can it be limited, by a showing that the decree comprised a greater or less area than the survey").

27/ Issuance of a patent to the Rancho Saucelito was delayed until Aug. 7, 1879, because of extended litigation. See United States v. Throckmorton, supra.

ultimately covered the entire sandspit. 28/ While the first three of these TLS's (TLS Nos. 10, 34, and 42) at least purported to exclude that part of the spit above high tide, the final four TLS's (TLS Nos. 77, 203, 204, and 205) expressly embraced such lands. Patents had issued for all of these lands by August 28, 1891.

The State points to these tideland surveys and patents as evidencing the contemporaneous understanding of local officials that the sandspit had not been included in the grants of the Rancho Las Baulines or the Rancho Saucelito (State of California's Additional SOR at 55-56). The appellees respond that "as the State itself intimates, what is revealed is the opportunism and ingenuity of local officials, quick to exploit an apparent ambiguity in federal surveys" (Title Companies' Response at 30). 29/ While the motivation of the Marin County surveyors may well be suspect, what is not debatable is that the various tideland surveys and patents created a chain of title totally at odds with an assertion of title by claimants or grantees of the Rancho Las Baulines. It is not surprising, therefore, that, in little more than a decade after the issuance of the majority of the TLS patents, litigation was commenced in the California courts between those claiming under conveyances from the Rancho Las Baulines and those asserting

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28/ Swamp and Overflowed Lands Survey No. 85 (covering 26.56 acres) was also made by the Marin County Surveyor in August 1864. This survey was ultimately cancelled in 1915 because some of the land therein described had been determined to be within the limits of the Rancho Las Baulines. See Title Companies' Answer, Exh. A at 17.

29/ Thus, the State noted that the first tidelands survey (TLS No. 10) was performed by Marin County Surveyor H. Austin based on a claim by Marin County Surveyor Alfred Easkoot. The State further noted that "[b]y 1891 the entire sandspit was claimed on the basis of such tideland surveys by various persons, most of whom were Marin County government officials" (State of California's SOR at 55).

title from the State of California pursuant to the tidelands patents. This litigation will be examined, infra. At the present time, we must turn to the application filed by John Lawler upon which so much of appellees' case rests.

On February 26, 1903, John Lawler assertedly entered upon certain lands within the sandspit for the purpose of establishing a homestead, built a house thereon and commenced to cultivate an orchard of approximately one acre. See Seadrift Reply, Exh. 1a. Shortly thereafter, Lawler filed an application with the U.S. Surveyor General, San Francisco, for the survey of the land he desired to enter, which he described as all of the arenal excepting 20 acres at the northwesterly end. Id. On March 26, 1903, the GLO authorized the issuance of special instructions for the survey.

Pursuant to this authorization, the Surveyor General contacted Paul E. Lepoids, a U.S. Deputy Mineral Surveyor, who commenced an initial investigation of the matter. Lepoids subsequently informed the Surveyor General that "the land in question was surveyed by the State Surveyor General as Swamp or overflowed land [30/] and patented to private individuals many years ago as shown by the enclosed data and tracing from the State Surveyor

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30/ On this point, Lepoids was clearly mistaken. As noted above (see note 28 supra), while there was an initial swamp and overflowed lands survey conducted for a small part of the sandspit, no patent ever issued based on that survey. The patents which had issued had issued for lands deemed tidelands. See Title Companies' Response, Exhs. 30, 31, 32, and 33. Indeed, while the survey form used contained the printed notation "Swamp and Overflowed Lands Survey No. \_\_\_\_", great care was taken in all of the later surveys to strike out any reference to "Swamp and Overflowed" and to insert the word "Tide" in lieu thereof. See, e.g., Title Companies' Answer, Exh. A, Subexhs. H, I, J, and K.

General's Office." See Seadrift Reply, Exh. 1b. So advised, the Surveyor General, by letter dated April 20, 1903, requested that the authorization for a survey be cancelled. By letter dated May 6, 1903, the GLO revoked the authorization for the survey.

Lawler then obtained counsel who filed a protest with the Commissioner of the GLO alleging serious irregularities in the treatment of the request for survey. See Title Companies' Answer, Exh. A, Subexh. L. After recounting the earlier actions set forth above, the Acting Commissioner stated:

The official plat of the survey of the Rancho Las Baulines confirmed to Gregorio Briones and patented January 9, 1866, which survey was executed by Robert C. Matthewson, D.S., in October, 1858, according to the plat approved December 3, 1859, shows the land in question as a "Sand Bar or Arenal" and according to this plat is attached to the Rancho Saucelito, which latter named rancho was confirmed to Wm. A. Richardson and patented August 7, 1879, as per survey executed by Wm. J. Lewis, in March, 1858, according to the plat approved October 2, 1860.

It appears, by comparing the two plats of the survey of said ranchos, that between the time of the survey of the Baulines Rancho and the Saucelito Rancho a change in Baulines Bay occurred by filling in so that according to the plat approved October 2, 1860, what is shown as "Sand Beach" thereon (the land in question) is attached to the Baulines Rancho. [31/]

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31/ With due respect to the Acting Commissioner, we are constrained to observe that his attempt to explain what had happened cannot be credited. First of all, we are not aware of any evidence before him that any such change had occurred. Indeed, in the present proceeding, appellees note that the U.S. Coast Survey topographic chart T-452, surveyed in 1854, "shows the spit as an upland feature (above ordinary high tide) of almost identical size, configuration and position as is observed today" (Title Companies' Answer, Exh. A at 41). A review of that chart confirms this observation. See State of California's Additional SOR, Map No. 6. Moreover, an examination of the tide records for the months from March to October 1858, fail to disclose any significant tidal event which might have caused so radical an alteration of the shoreline over so short a period of time. See Title Companies' Response, Exh. 6.

Title Companies' Answer, Exh. A, Subexh. M at 5-6. After noting that the State of California had asserted jurisdiction over the lands as tidelands, the Acting Commissioner opined that "[i]t makes no difference whether the land was surveyed as swamp and overflowed land or as tide land, as, if it were land of either kind it would not be regarded as public land of the United States subject to survey and disposal as such" (id. at 8 (emphasis in original)). While the Acting Commissioner concluded that since the land had not been shown to be public land of the United States the instructions to revoke the authorization for a survey would not be modified, he also noted that

this action does not preclude [Lawler] or any other person from applying at any time in due form for the survey of the land, and if it should be hereafter shown that the land is public land of the United States subject to survey and disposal as such, proper action would then be taken by this office on such application.

Id.

Pursuant to this suggestion, Lawler then filed a formal application for a survey of the land which he sought to embrace within his homestead entry. This matter was once again referred to the GLO Commissioner by the

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fn. 31 (continued)

More fundamentally, the Acting Commissioner confused the date that the plats were approved with the date the surveys were run on the ground. While the Baulines plat was approved before the Saucelito plat, the Baulines survey was run after the Saucelito survey had been completed. Thus, if Baulines Bay had been filled in during the period between the two surveys, Matthewson would have ended up on the coast of the Pacific Ocean and not, as he reported, on the shore of Baulines Bay. While it may be impossible to determine with certitude what exactly transpired during the performance of the two surveys, the explanation advanced by the Acting Commissioner is clearly not the answer.

Surveyor General with a recommendation that the application be denied on the theory that the decree of confirmation of both the Rancho Las Baulines and the Rancho Saucelito declared the Pacific Ocean as the Southwestern boundaries of the Ranchos and, hence, the sandspit must be in either one or the other.

By letter dated May 25, 1904, after recounting much of the prior history of Lawler's attempt to obtain a survey of the sandspit, the application was again rejected. A reading of the Commissioner's decision makes it clear that, to a large extent, the application was rejected in reliance on a decision of the Superior Court of Marin County in Adams v. Mulvaney, dated January 18, 1904, which was quoted extensively by the Commissioner. 32/

The case of Adams v. Mulvaney involved a suit in ejectment initiated by Walter M. Adams and other claimants who based their title on tideland patents received from the State of California against various individuals then occupying areas of the sandspit, including Lawler. While the court did render a decision on behalf of the plaintiffs, this decision was not based on a conclusion that all of the lands were properly patented as tidelands. On the contrary, the court expressly found that:

[T]he entire "arenal", whatever its dimensions may have been, was not in 1850, and never, since, has been, what is known, in the eyes of the law, as tide land \* \* \*. In fact the evidence of both plaintiff and defendant establishes beyond a doubt that the entire

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32/ See State of California's Additional SOR, Exh. 18, for the text of the decision in Adams v. Mulvaney.

"arenal" was never covered, at any time, by any kind of tide water except upon the rare occasions of very great storms. [Emphasis in original.]

State of California's Additional SOR, Exh. 18 at 4. Plaintiff's suit was ultimately successful because, while the court found that the entire arenal was not tideland, it also found that "the inference to be drawn from all the evidence is as strong as it is unavoidable, that at least a portion of the 'arenal' was tide land although what precise and particular portion is not quite clear." Id. at 5 (emphasis in original). Since the court also found that it was the defendants' obligation to affirmatively establish that the lands which they occupied were not tidelands, the inability of the court to locate that portion of the arenal which was tidelands proved fatal to their claims. It is difficult, however, to understand the Commissioner's reliance on this decision since it clearly held that part of the arenal was not tidelands.

In any event, Lawler then pursued an appeal to the Secretary of the Interior. On September 8, 1904, the Acting Secretary, after briefly recounting both the assertion of the Surveyor General that the land was part of either the Rancho Las Baulines or the Rancho Saucelito as well as the claim by the State of California that the lands were tidelands, affirmed the decision of the Commissioner (Seadrift Reply, Exh. 1m). In doing so, the Acting Secretary rejected a request the action be stayed pending the termination of litigation in the California courts with respect to the status of the land in question, noting that:

As there were other sufficient grounds for rejecting the application there appears to be no reason for suspending action upon the appeal, especially since the applicant would not be prejudiced thereby but can renew his application at any time hereafter if the result of the litigation referred to should furnish any ground for a favorable consideration of his application.

Id. No appeal, however, was ever prosecuted from the decision in Adams v. Mulvaney, supra. Yet, as appellants argue, subsequent events have, indeed, greatly undermined the theoretical basis for the rejection of the Lawler application.

Contemporaneously with the proceedings before the Department, another dispute between conflicting claimants was being adjudicated by the California courts. In Upton v. Easkoot (No. 2525, Sept. 18, 1905), the Superior Court for Marin County rejected a quiet title suit brought by A. H. Upton, claiming rights derived from the patent of the Rancho Las Baulines, 33/ against various other individuals claiming under tideland patents from the State. In its decision, the court expressly held that: "No land \* \* \* which is situated south or southwesterly of the northeasterly line of the shore (at the line of ordinary high tide thereon) of Bolinas Bay (sometimes called Bolinas Lagoon) as the same existed in the month of October, A.D. 1858, is or ever was any part or portion of the

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33/ Upton's claim was both to the sandspit and to the lands lying under Bolinas Bay. N. H. Stinson intervened in the proceeding, also claiming under the grant of the Rancho Las Baulines. Stinson's claim, however, was limited solely to the sandspit. Additionally, it should be noted that one of the defendants, William Kent, claimed title to the entire sandspit based on the theory that the sandspit was part of the Rancho Saucelito, in addition to claiming a one-half interest in the patents of TLS Nos. 203 and 204. See State of California's Additional SOR, Exh. 20 at 5.

Rancho de los Baulinas \* \* \*" (State of California's Additional SOR, Exh 24 at 3-4). Judgment pursuant to this decision was entered on November 13, 1905. While no direct appeal was perfected from this decision, 34/ a subsequent suit based thereon eventually reached the California Supreme Court.

The litigation which culminated in the decision in Curtis v. Upton, 175 Cal. 322, 165 Pac. 935 (1917), was an outgrowth of Upton v. Easkoot, supra. Pursuant to the judgment in the latter case, J. F. D. and H. L. Curtis, successors-in-interest to Easkoot, applied for a writ of restitution, seeking to compel the sheriff to put them in possession of a tract of land alleged to be part of TLS Nos. 10 and 34. Contingent therewith, they also filed an action in ejectment seeking damages for their unlawful ouster. The critical issue in this litigation was the location of TLS Nos. 10 and 34. Upton answered by arguing that the lands involved were not within the tideland patents and that these patents were, in any event, void for uncertainty since it was impossible to locate them upon the ground. Upton also claimed new title based on a conveyance from William Kent, then owner of the Rancho Saucelito.

On March 13, 1913, the Superior Court of Marin County denied the relief requested by the Curtises. The court noted that the key point in determining the situs of the patents for TLS Nos. 10 and 34 was the location of corner T.B. 208 of the Matthewson survey. 35/ As was noted by the court,

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34/ Actually, Stinson did file a notice of appeal from the judgment. See State of California's Additional SOR, Exh. 37. This appeal was ultimately dismissed. See State of California's Additional SOR, Exh. 38 at iv.

35/ Thus, the State patent for TLS No. 10 started at that corner, also declaring "said post being S. 28 1/2° E. 15.80 chains from the NW corner of the NE 1/4 of sec. 33, T. 1 N., R. 7 W., M.D.M." The patent for TLS No. 34,

however, corner T.B. 208 was no longer extant. See State of California's Additional SOR, Exh. 38 at xii. The parties accordingly introduced the work of private surveyors attempting to locate this corner.

The Curtis forces relied on a survey conducted by George M. Dodge. The Dodge survey attempted to locate corner T.B. 208 based on the original location of the Easkoot house which was referenced by Matthewson in the initial course following corner T.B. 208. Computing backwards from this location, Dodge located T.B. 208 approximately half a mile southeast from the southeastern extremity of Bolinas Bay, as it then existed, and approximately 140 yards from high water on the Pacific Ocean. Id. at xiv. The court, in rejecting the Dodge survey, noted that, even taking into consideration the filling in of the Bay between the date of the Matthewson and the date of the Dodge surveys, the most favorable testimony would place the corner of Bolinas Bay as of the date of the Matthewson survey at least 200 feet northwest of the Dodge location. Moreover, the boundary line of TLS No. 10, as depicted by Dodge, at one point ran fully 330 feet to the northeast of a county road, which everyone admitted was, itself, above the high tide line. Id. at xvi.

These problems with the Dodge survey were exacerbated by the fact that TLS Survey No. 34, which commenced 0.30 chains northwest of T.B. 208, was

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fn. 35 (continued)

on the other hand, commenced "[b]eginning S. 28 1/2° E. 15.50 chains from the N.W. corner of the N.E. 1/4 of sec. 33." Since, as the court noted, there had been no general monumentation of the area around Bolinas Bay and no section corner monument existed from which the NE¼ could be located, the location of corner T.B. 208 would actually control the location of the NW corner of the NE¼, sec. 33. See State of California's Additional SOR, Exh. 38 at xii.

also described as "[b]eing a portion of the beach of the Pacific Ocean lying between high and low water," which would effectively place the shore of the Pacific Ocean north of the southeastern corner of Bolinas Bay. Id. at x and xxii.

Upton relied upon a survey conducted by George L. Richardson. Richardson concluded that, while the survey plat of the Rancho Saucelito was correct, the survey plat of the Rancho Las Baulines was in error. Richardson based this assertion on his conclusion that T.B. 208 was set on the shore of the Pacific Ocean, not on the shore of Bolinas Bay, and was identical with post S 58 set by Lewis in running the Rancho Saucelito survey. See Title Companies' Response, Exh. 7 at 2. This placement of the corner, of course, also necessitated a finding that the next call, i.e., "Thence up the shore of Baulines Bay, at ordinary high tide mark" a distance of 78.20 chains on a course N. 38½° W. to a Station, was actually a random course which did not follow the shore of Bolinas Bay. Id. With such a corner placement, the vast majority of the land within TLS No. 10 would have consisted of uplands not covered by the ordinary tides of the Bay. 36/

Comparing these two surveys with the official field notes and plat of survey of the Rancho Las Baulines, the court concluded that it was

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36/ Quite frankly, it is difficult to give much credence to Richardson's conclusions. They are in such thorough conflict with Matthewson's field notes that they simply cannot be reconciled with them, absent a showing, and none has ever been even attempted, that the Matthewson survey was fraudulent, at least with respect to corner T.B. 208. While it may be impossible, at the present time, to ascertain how Matthewson came to be on the shore of Bolinas Bay rather than the Pacific Ocean, the fact that he was there seems unassailable.

impossible to accept the Dodge location of corner T.B. 208, finding that "the collateral call to Easkoot's house [in the Matthewson survey] was inaccurate." Id. at xx. He held, therefore, that the Curtises "have not shown the location of the tracts in such a way as to enable the sheriff to put them in possession, nor have they shown in the ejectment suit that they have title to any land which is in the possession of the defendants." Id.

In addition to making this ruling, however, the court also addressed the contentions of Upton and Stinson, the intervenors. Thus, the court found that "no title ever vested in Upton by virtue of his grants from the heirs of Briones," specifically holding that "[t]he patent to Briones superseded the Mexican 'expediente' for all purposes." Id. at xxi. He also expressly held that "the arenal was never part of the Saucelito Rancho." Id. In effect, therefore, while the court rejected the adverse claims by the holders of the Rancho Las Baulines and the Rancho Saucelito to the arenal, it ultimately held against the Curtises because of the inability to locate the tideland patents, which they claimed under, on the ground. The Curtises thereupon sought review of this decision in the California Supreme Court.

In its decision in Curtis v. Upton, supra, the California Supreme Court reversed the decision of the Superior Court denying relief to the Curtises. Essentially, the Supreme Court predicated its reversal on the failure of the Superior Court to establish the location of TLS Nos. 10 and 34. Thus, the Supreme Court noted that the question before the court, as framed by the complaint, was not to decide whether the Dodge corner was correct but to determine the true position of T.B. 208 on the ground:

It was the duty of the court to consider all the evidence on the subject and therefrom to find the fact of the true position of the corner and determine whether or not the defendants had taken possession of any part of the tract claimed by the plaintiffs, when measured from such true position.

Id. at 330, 165 Pac. at 938. And, the court found, that, to the extent that any land so determined was under the occupancy of either Upton or Stinson, they were barred by the judgment in Upton v. Easkoot, from asserting any right thereto.

We note, however, that in the course of its decision, the Supreme Court expressly held that the title to the tidelands held by the Curtises vested no rights in any of the uplands of the sandspit. Thus, the opinion noted:

The state patents purport to convey state tidelands only, and they could convey none of the upland of the sandspit, for, as it was neither school land nor swamp land, the state had no title to that upland. The terms of the descriptions of the surveys imply that no upland was intended to be included therein and they should be construed to embrace only tidelands, to which the state held title. The plaintiffs therefore failed to establish a record title to this upland along the center of the sandspit.

Id. at 329, 165 Pac. at 938. Yet, at the same time that the court was, in effect, disallowing any claim to the upland based on the tidelands patents, it was also invoking the holding of Upton v. Easkoot, supra, that "the patent of the United States to Briones, under which both Upton and Stinson claimed their alleged titles, did not include, or convey to Briones, any portion of the sandspit." Id. at 331, 165 Pac. 938. These rulings when combined with the fact that the Department of the Interior had already, in the John Lawler litigation set forth above, disclaimed any Federal ownership

of the sandspit seemed to leave the question of the ownership of the sandspit in a legal no-man's land.

Nor have subsequent events served to clear up the muddied waters. Shortly after the end of the Curtis v. Upton litigation, William Kent, who had participated in the Upton v. Easkoot suit as both a tidelands claimant and a claimant under the grant to the Rancho Saucelito (see note 33, supra), acquired most of the claims to the western portion of the sandspit from those claiming under the tideland grants as well as most of those rights inuring to the Rancho Las Baulines and the Rancho Saucelito. 37/ See State of California's Additional SOR, Exh. 16; Seadrift Reply, Exh. 10b. While the area adjacent to the eastern end of the sandspit 38/ had been subdivided in 1913 by Charles Robinson, no further action to develop the sandspit was undertaken for a number of years. 39/

In 1931, however, the area immediately west of the Robinson Tract was subdivided by Archie H. Upton into 258 residential lots. See Seadrift

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37/ Kent's acquisition of rights occurred primarily in the western portion of the sandspit, beyond the area of TLS Nos. 10, 34, and 42. See Seadrift Reply, Exh. 10b.

38/ See Seadrift Reply, Exh. 9b. Whether and to what extent this subdivision was actually on the sandspit or within the grant of the Rancho Saucelito or the Rancho Las Baulines would be dependent upon the placement of corners S 58 and T.B. 208, respectively.

39/ There is some evidence that this period of inactivity was directly related to the uncertainty of titles to the sandspit. Thus, in a memorandum written in 1914, Kent, after noting that he had acquired most of the tideland patents and the Rancho's rights to the sandspit, stated that he was "perfectly willing to sit quiet and let somebody else make the next move. \* \* \* [T]here can never be any considerable improvement until titles are definitely determined, which it appears can only result through court decisions, and I for one have had too much litigation in this matter already" (State of California's Additional SOR, Exh. 16).

Reply at 8 and Exh. 9a. Upton's rights to the sandspit were apparently based on the Rancho grants, 40/ notwithstanding the decisions in Upton v. Easkoot, supra, and Curtis v. Upton supra. Id. at 9 and Exh. 10a. These lots were subsequently sold to third parties.

While the Upton tract was thus being developed, no such development occurred on the lands to the west, apparently out of concerns for the confused state of the land titles. In 1949, the State of California enacted legislation authorizing the initiation of a suit against the State by any person claiming title under patents to TLS Nos. 77, 203, 204, and 205 for the purpose of establishing the boundaries thereof and of quieting title thereto. See Title Companies' Response, Exh. 30. Such a suit, styled William Kent Estate Co. v. State of California (Marin County Case No. 19966), was subsequently initiated by the William Kent Estate Company, successor-in-interest, through mesne conveyance, of William Kent. The State of California stipulated to a disclaimer of interest in the uplands on the sandspit and a decree was issued on February 10, 1950, quieting title in the Estate and enjoining the State of California and anyone claiming under it from asserting any right or interest therein. See Seadrift Reply, Exh. 3. However, it is important to note that even appellees admit that this adjudication is not binding on the United States, as it was not a party to the

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40/ By 1905, Kent had obtained all rights appurtenant to the grant of the Rancho Saucelito in the area of the arenal. At about the same time, Upton had obtained the rights of the Rancho Las Baulines with respect to the arenal. Apparently in order to resolve any conflicts between them, on Mar. 31, 1910, Upton conveyed to Kent all his interest in the northwesterly 142 acres of the arenal while, on that same date, Kent conveyed all his interest in the arenal southeasterly of the 142 acres. See Seadrift Reply, Exh. 10b at 5

suit, though appellees suggest the State of California, at least, "cannot so easily deny the import of the judgment it agreed to" (Title Companies' Response at 36).

While at least three other State court suits involving the western area of the sandspit have been prosecuted since 1950, 41/ none of these actions has any particular bearing on the question of Federal ownership of the sandspit. Rather, the foregoing history, explored above in all its convolutions, represents the factual and legal framework in which the present case arises. It is clear that the single substantive question presented is simply whether the Bolinas Sandspit is or is not owned by the United States at the present time. However, before addressing the substantive issue, it is necessary to briefly deal with various procedural challenges which appellees have made to the instant appeal.

A fair amount of the briefing by all parties has been directed to various procedural challenges made by Seadrift and the Title Companies to appellants' standing to appeal, as well as to the existence of a decision which is properly justiciable. Doubtless, much of this was engendered by this Board's Order of May 9, 1989, in which we specifically requested that the parties address the Board's jurisdiction and the standing of appellants to proceed with their appeals. Pursuant to this order, appellees have argued variously that the State of California and NRDC lack standing to

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41/ These cases were People v. William Kent Estate Co., 242 CA.2d 156 (Cal. App. 1966), William Kent, III v. Wimmer, No. 66159 (Marin County, Superior Court, July 18, 1973), and People v. William Kent Estate Co., 1 Civ. No. 31405 (Cal. App. Oct. 10, 1973).

appeal from the decision of the State Director and that, in any event, the decision of the State Director, being merely a reaffirmation of the position taken by the Acting Secretary in the John Lawler appeal in 1904, is not such a decision as is subject to appeal at this late date.

[1] As this Board has noted on numerous occasions, in order to have standing to appeal from a BLM decision, an appellant must, in accordance with 43 CFR 4.410(a), be a "party to a case" and have been "adversely affected" by the decision. See, e.g., Dorothy A. Towne, 115 IBLA 31, 34-35 (1990); Colorado Open Space Council, 109 IBLA 274, 279-80 (1989); In re Pacific Coast Molybdenum Co., 68 IBLA 325, 331 (1982). The first prong of our standing test may be met by a showing that an appellant "actively participated in the decisionmaking process regarding the subject matter of [the] appeal." Sharon Long, 83 IBLA 304, 307 (1984). In this regard, we have no difficulty finding that the State of California has been a party to the case within the meaning of our precedents. See California Association of Four Wheel Drive Clubs, 30 IBLA 383 (1977). While the status of NRDC is more problematic, we note that it did expressly inform the State Director of its interest in the matter by letter dated October 14, 1988. The failure of the State Director to thereafter communicate with NRDC cannot work to deprive it of consideration as a party to the case. Cf. Utah Wilderness Association, 91 IBLA 124 (1986) (failure to protest issuance of applications for a permit to drill held not fatal to appeal from their issuance when BLM failed to notify appellant of their pendency after notice of appellant's interest).

The question whether appellants have shown that they were adversely affected by the decision being appealed is more difficult. Generally, a disclaimer of Federal ownership will not be seen as adversely affecting anyone not claiming an inchoate title through the United States or a right to use the land granted by the United States. <sup>42/</sup> The argument of the State (and NRDC) is that if the United States were determined to be the owner of the unoccupied portions of the sandspit fronting the Seadrift Sub-division, citizens of California would have the right of access to those beaches, a right presently denied them. See State of California's Additional SOR at 15-17. Further, the State argues that the effect of the State Director's decision is to hold that the decree of confirmation rather than the patent determines the extent of a rancho grant and that this holding, if applied to other grants within the State, would result in greatly unsettling titles throughout the State.

While these claims of injury are somewhat tenuous, we believe they are sufficient, under our precedents, to establish standing. Thus, in California State Lands Commission, 58 IBLA 213 (1981), while rejecting a challenge by the State to inclusion of lands within a wilderness study area on the theory that such action impermissibly limited the exercise of outstanding State lieu selection rights, we nevertheless found that the State possessed standing to appeal, noting that "where, as here, at least colorable allegations of injury exist, the existence of standing cannot be

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<sup>42/</sup> An example of these types of situations would be a Native allotment application for or a mining claim located on lands deemed patented by the United States or a grazing lease or a right-of-way situated on such lands. See, e.g., Aguilar v. United States, 474 F. Supp. 840 (D. Alaska 1979); Raymundo J. Chico, 115 IBLA 4 (1990).

made dependent upon ultimate substantive success on appeal." In a similar vein, in State of Alaska v. Sarakovikoff, 50 IBLA 284 (1980), we held that the State of Alaska had standing to protest and appeal a decision to grant a Native allotment even though it was admitted that the State could not obtain the actual land embraced by the allotment as it was also within the core township of a village corporation. We noted that if the State were successful in attacking the Native allotment application, the village corporation would be required to select that land which, in turn, would diminish the village's ability to select additional land which the State might determine was suitable for selection under its statehood grant. Such an interest, attenuated though it might be, was, we concluded, sufficient to confer standing on the State. Id. at 288. So, too, in the instant case, we believe that the State, as well as NRDC, has made at least a colorable allegation of injury sufficient to establish its standing to appeal. 43/

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43/ Our finding herein is fortified by the realization that on March 14, 1990, subsequent to its appeal from the decision of the State Director under review herein, the California State Lands Commission filed a Recreation and Public Purposes (R&PP) application to lease or purchase certain lands on the Bolinas Sandspit. That application was returned to the Commission on the theory that the BLM State Office could take no action at the present time which might disturb the status quo pending IBLA's decision on the instant appeal. BLM noted, however, that the State of California could refile its application after the Board ruled on the matter. See Letter of Mar. 29, 1990, from Chief, Branch of Adjudication and Records, California State Office, BLM, to Executive Director, California State Lands Commission.

Leaving aside any question whether the proper procedure for the BLM State Office in the instant case was to suspend consideration rather than return the filing, it is clear that the mechanism exists by which the State can file a formal R&PP application for the land and then, if rejected on the theory that the land is not Federally owned, appeal to this Board, thereby raising the precise issues presently being litigated. Little would be gained by following a course of action of dismissing the instant appeal, without ruling thereon, on the theory that the State has not been adversely affected thereby, only to have a new application for a R&PP lease filed and rejected, which rejection would clearly be subject to review before the Board. Cf. Beard Oil Co., 97 IBLA 66, 68 (1987) (declining to remand a premature appeal on the grounds that it would serve no useful purpose).

[2] In appellees' final procedural challenge, they argue that there is no appealable decision for the simple reason that there is no "case." 44/ The Title Companies argue that the decision of the State Director merely described actions previously taken. Those substantive determinations, however, were made in 1904. Thus, appellees argue, "[r]eporting upon actions previously taken is in no way equivalent to an initial decision disposing of public lands or granting permission to use it for various statutorily authorized purposes" (Title Companies' Response at 4-5). Seadrift concurs, arguing that the State Director's decision is merely an advisory letter informing the State of California of the result of the State Director's investigation of the matter. See Seadrift Reply at 30-31.

Appellees are correct in noting that this Board has, in various decisions, rejected attempts by parties to use a status inquiry as a vehicle to obtain substantive review of a base decision which could have been appealed but was not. See, e.g., The Wilderness Society, 106 IBLA 46, 53 (1988); Utah Wilderness Association, 65 IBLA 219, 221 (1982). These rulings proceed on the theoretical basis that, since the Department has established an appellate structure to afford aggrieved parties with a forum for review of their complaints, requiring only that they establish their standing to appeal and act to file their appeals in an expeditious manner (30 days from

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fn. 43 (continued)

We note that this consideration applies not only to the question of whether appellants have been adversely affected but also to the question of whether there has been an appealable decision, discussed infra.

44/ We note that, in transmitting the case file to the Board, the California State Director also raised the issue of whether an appealable decision had been made. See Memorandum dated May 9, 1989, from California State Director to Board of Land Appeals.

receipt of the adverse decision) to avail themselves of their right to review, those who, through either neglect or choice, fail to timely exercise their right should not be permitted to subsequently raise matters that could have been appealed in the first instance. Allowing parties, through the simple mechanism of making a status inquiry and then appealing the answer, to obtain substantive review of those matters which could have been appealed earlier but were not, would not only make a mockery of the mandatory time limit for seeking review codified at 43 CFR 4.411, 45/ but would also be totally disruptive to the proper administration of the public lands.

The problem with applying this rule in the confines of the appeal presently before the Board is that it is clear that the State of California was not a party to the John Lawler litigation or to previous Departmental adjudications in which it could have raised the issue of the ownership of the sandspit. The animating principles of the decisions in The Wilderness Society, supra, and Utah Wilderness Association, supra, are simply not applicable. Accordingly, we must conclude that the decision of the State Director is appealable as a present matter and that nothing in John Lawler bars the appellants from seeking review of the State Director's decision. But, what the 1904 decision in John Lawler does implicate are questions as to the applicability of the principles underlying administrative finality to the present case. We turn now to that question and its impact on our resolution of the issue of the Federal ownership of the Bolinas Sandspit.

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45/ In Tagala v. Gorsuch, 411 F.2d 589 (9th Cir. 1969), the court agreed with the Department that the timely filing of a notice of appeal was jurisdictional and, hence, a failure to comply with such time limits was preclusive of review within the Department.

Were we to consider de novo the matters decided by the decision in John Lawler, it would be virtually impossible to sustain the conclusion therein espoused. First of all, it seems elementary that the Department, as the custodian of the public domain, should never be in the position of disclaiming title to lands without being able to identify why title had never lodged in the United States or the precise mechanism by which the United States has disposed of the land. To hold, as did both the Acting Secretary and the Commissioner of the GLO in their respective examinations of the John Lawler appeal, that the land was part of either the grant of the Rancho Las Baulines or the Rancho Saucelito or were tidelands claimed by the State 46/ does not adequately discharge this responsibility.

Moreover, an examination of the separate elements on which the determination that there were no public lands on the sandspit was based leads ineluctably to the conclusion that the uplands portion of the Bolinas Sandspit should have been determined to be public lands in the 1904 decision. That all of the lands on the sandspit were not tidelands is a fact that must have been obvious to the Department since both the decision of the Commissioner, GLO, and the Acting Secretary referenced the decision of the Marin County Superior Court in Adams v. Mulvaney, supra, which had expressly held that "the entire 'arenal', whatever its dimensions may have been, was not in

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46/ Moreover, the mere fact that the State claimed the lands as tidelands would never bind the Department or the United States. See, e.g., Sandra L. Lough, 25 IBLA 96, 100-101 (1976). If the lands were tidelands, title vested in the State upon its admission to the Union, absent a prior appropriation by the United States. But, if the lands were not tidelands, the State's assertion of ownership is a nullity.

1850, and never, since, has been, what is known, in the eyes of the law, as tide land" (State of California's Additional SOR, Exh. 18 at 4 (emphasis in original)).

[3] Nor is there any theoretical basis upon which it could be concluded that the sandspit was conveyed as part of the Rancho Saucelito. As noted above, the plat of the Rancho Saucelito clearly located the northwest boundary of the rancho south of the sandspit, showing it as within the Rancho Las Baulines. Moreover, the field notes of the Rancho Saucelito survey establish that, after locating corner S 58 on the shore of the Pacific Ocean, the surveyor proceeded N. 55 $\frac{1}{4}$ ° E., a distance of 101 chains. This line is clearly a surveyed line, not a meander line. As such, it is a line of boundary and necessarily limits any extension of the Rancho Saucelito northwesterly.

Admittedly, there is some indication from the *diseño* filed with the application for the Rancho Saucelito that the southern base of the arenal was within that grant. Clearly, however, the survey of the Rancho Saucelito did not include the base. And, to the extent that appellees' have argued that where a conflict appears to exist between the decree of confirmation of a Mexican concession and the survey thereof, the decree controls over the survey (a theory also espoused by the BLM State Director in his decision below), we agree with the State of California that this position is simply not sustainable under the law.

Thus, as we have noted (see note 25, supra), while section 15 of the Act of March 3, 1851, limited the conclusive effect of either the decree

of confirmation or any patent issued pursuant thereto only to the United States and the claimants, this necessarily established that between the United States and the claimants these documents were binding. See United States v. Flint, 4 Sawy. 42, 49 (cited in John Adams, 51 L.D. 591, 593 (1926)). Moreover, while both the decree and the patent were accorded conclusive effect, it is also clear that, should there be a conflict between the two, the patent would control. Thus, the Supreme Court noted in Dominguez De Guyer v. Banning, supra at 737,

if those who obtained the decree of confirmation objected to the survey as not being in conformity with that decree, their objection should have been made known to the District Court before the survey was transmitted to the General Land Office, or at least before it was acted upon and made the basis of a patent.

Later in its decision, the Court noted:

We are of opinion that while it may be true, in some cases, that an action to recover possession of lands confirmed to a claimant under the act of 1851 can be maintained before a patent is issued, yet a patent issued avowedly in execution of such decree was conclusive between the United States and the claim-ants, and, until cancelled, it alone determines, in an action to recover possession, the location of the lands that passed under the decree. Such is the effect of former decisions of this court.

Id. at 740. To similar effect are the decisions in Summa Corp. v. California, supra, United States v. Sepulveda, supra at 109, and United States v. Peralta, supra at 631. See also Ben McLendon, 49 L.D. 548, 552 (1923) (holding that the approval of a survey plat of a Mexican land claim "amounts to a final determination of the exact situs of the land involved" (emphasis in original)).

The cases cited by appellees for the proposition that one may look behind the patent to the confirmation proceedings fall, with only one exception, into two general categories rendering them inapposite to the issue. Thus, there are those cases such as Stewart v. United States, 316 U.S. 354 (1942), and Rancho Corte de Madera del Presidio, 1 L.D. 232 (1882), which noted that upon confirmation of a Mexican grant by either the Board of Land Commissioners or the courts, the performance of a survey in accordance with the grant was a purely ministerial act with no discretion to be exercised by the surveyor. All of these cases, however, involved appeals commenced before patent issued and, therefore, are simply not germane to the question of the authority to challenge a patent on the theory that it did not correctly describe the land as confirmed. <sup>47/</sup>

The second class of cases involves decisions such as Thomas B. Bishop Co. v. Santa Barbara County, 96 F.2d 198 (9th Cir. 1938), in which courts have looked to the decree of confirmation as an aid in determining what land the patent actually embraced. In the Bishop case, the court was attempting to determine whether a sandspit jutting out from a meandered line was intended to be included in the patent of the Rancho Los Dos Pueblos. Based on the decree of confirmation, the court concluded that the patent was intended to include the sandspit and that the sandspit had not been surveyed because it was deemed "inconsequential." Id. at 201.

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<sup>47/</sup> It is obvious, of course, that, even in an appeal challenging a survey as not in conformity with the decree initiated prior to issuance of patent, this principle applies only to grants which were deemed grants of description and is totally inapplicable to grants deemed grants of quantity since, it was only by the survey that the situs of the quantity grants could become fixed within the area described in the decree of confirmation.

But, while it may be admitted that recourse may be made to the decree of confirmation to determine what the patent actually conveyed where an ambiguity in the patent exists, it is a totally different proposition to suggest that where a patent clearly excludes a parcel of land, recourse may be made to the confirmation decree to contradict and alter the description of lands in the patent. Indeed, the court in the Bishop case took special pains to note that "[t]his is not a case of omission from a survey of land that ought to have been surveyed." Id. And since, as noted above, the northwestern boundary line of the Rancho Saucelito is clearly not a meander, there is no possibility of applying the principle of the Bishop case so as to include the sandspit within the Saucelito grant.

The one case which supports appellees' contention that the description contained in the patent is subordinate to the description contained in the decree of confirmation is the decision of the United States District Court for the District of Columbia in Pueblo of Taos v. Andrus, 475 F. Supp. 359 (1979). Therein, the court held that boundaries recited in a patent of a confirmed Spanish land grant in New Mexico were not binding because none of the parties to the litigation had relied on the line of survey challenged therein, which line, the court held, was not in accord with the decree of confirmation. We decline to apply this holding to the instant appeal for a number of reasons.

First of all, the court cited no precedents, whatsoever, that supported its conclusion. Indeed, the only cases cited by the court (Dominguez De Guyer v. Banning, supra, and Grainger v. United States, 197 Ct. Cl. 1018

(1972)), held to the contrary. It is possible that the court premised its conclusion on the theory that, since the land was held in trust for Indian beneficiaries, the terms of the grant should be liberally construed in their favor. Id. at 366. Nevertheless, even granting the trust responsibilities inherent in the relationship between the Department and Native American tribes, it is difficult to reconcile the court's decision in the Pueblo of Taos appeal with prior Supreme Court decisions. 48/

But, even if we were to concede that the decision in Pueblo of Taos was correctly decided, it is clearly distinguishable from the case at bar. Thus, with respect to Spanish and Mexican land claims in New Mexico, Congress did not establish a Board of Land Commissioners as it had in California. Rather, under the Act of July 22, 1854, 10 Stat. 308, the position of Surveyor-General of New Mexico was created, who was charged, inter alia, with investigating all claims originating before the Treaty of Guadalupe Hidalgo and reporting thereon to Congress. No time limit, however, was provided for the presentation of claims and, as late as 1885, new claims were being presented and only a fraction of the claims that had been

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48/ We note that in Pueblo of Sandia Boundary, 96 I.D. 331 (1988), Solicitor Tarr characterized the decision in Pueblo of Taos v. Andrus, supra, as "questionably reasoned." Id. at 360, note 20. One example of this questionable reasoning is that the court invoked the principle that grants to Indians are favorably construed on their behalf to determine that the surveyor, Walker, had failed to correctly survey the eastern boundary of the Martinez claim, even though Martinez was not an Indian. The court justified this result on the theory that the land was subse-quentially acquired by the United States on behalf of the Pueblo of Taos and the terms of the decree of condemnation should be liberally construed in its behalf. We note, however, that neither of the two cases cited by the court (Antoine v. Washington, 420 U.S. 194 (1975); Passamaquoddy Tribe v. Morton, 388 F. Supp. 649 (D. Me. 1975)), remotely supported this novel approach.

presented had been adjudicated. <sup>49/</sup> Frustrated by the slow pace of adjudication, Congress adopted the Act of March 3, 1891, 26 Stat. 854, establishing the Court of Private Land Claims for the adjudication of Mexican or Spanish land claims within the Territories of Arizona, New Mexico, and Utah, and the States of Nevada, Colorado, and Wyoming, and providing two years for the submission of these claims.

Section 10 of that Act provided that:

[W]henever any decision of confirmation shall become final, the clerk of the court in which the final decision shall be had shall certify that fact to the Commissioner of the General Land Office, with a copy of the decree of confirmation, which shall plainly state the location, boundaries, and area of the tract confirmed. The said Commissioner shall thereupon without delay cause the tract so confirmed to be surveyed at the cost of the United States.

Further provision was made for the return of the survey to court for a determination that the survey was "in substantial accordance with the decree of confirmation" which would then serve as the basis for the patent. Id. No provision of the Act of March 3, 1891, supra, however, replicated section 13 of the Act of March 3, 1851, supra, providing for the conclusive nature of the patent when issued. Thus, the legal framework under which the issues in Pueblo of Taos arose are sufficiently different as to vitiate any attempt to apply that precedent to cases arising in California under the Act of March 3, 1851, supra. Accordingly, we conclude that nothing in the decision of the district court in Pueblo of Taos v. Andrus, supra, undermines

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<sup>49/</sup> See generally P. Gates, History of Public Land Law Development, 117-18 (1968).

the Board's conclusion that, to the extent that it might be contended that the description in a patent of land issued under the Act of March 3, 1851, does not coincide with the description contained in the decree of confirmation, the description in the patent must be accorded conclusive effect.

Appellees suggest that even if the patent would be construed as conclusive in an adversarial proceeding between the United States and the grantees or those claiming under them, 50/ it would not prevent the United States from taking action to reform the patent. But, even if it be admitted that the authority of the Department to correct a conveyancing document provided by 43 U.S.C. § 1746 (1988) would extend to rancho patents, it is obvious that one of the prerequisites of such action would be a showing that an error had, in fact, occurred. Insofar as the patent of the Rancho Saucelito is concerned, there is absolutely no indication, whatsoever, that such is the case. On the contrary, Lewis' testimony in the Bolinas confirmation proceedings discloses that corner S 58 was established with the help of both the son of William Richardson, grantee of the Rancho Saucelito, and Captain Isaac Morgan, who claimed the land adjoining the Saucelito Rancho under a grant from Briones. See Tr. 86. Indeed, save for William Kent's singularly unsuccessful attempts to claim title to the sandspit during the State court litigation in the early 1900's, the only attempt to question whether this was the proper point signifying the line of juridical possession was made by the United States in its abortive attempt to challenge the

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50/ In Dominguez De Guyer v. Banning, supra at 743, the court quoted the same discussion from Chipley v. Farris, supra, that was approved in United States v. Peralta, supra at 631: "While [a patent] stands, the claimant, or those deriving title through him, will not be permitted to aver that the claim comprised other or different lands from those mentioned in the patent."

southeastern boundary line of the Rancho Las Baulines as extending too far to the southeast (see note 17, supra). 51/ In short, the record before the Board provides absolutely no basis for concluding that the survey and patent of the Rancho Saucelito was anything other than accurate and that, as surveyed, it did not include the arenal.

Admittedly, the vast majority of appellees' efforts was directed towards showing that the sandspit should have been included within the Rancho Las Baulines, not the Rancho Saucelito. But the foregoing discussion applies with equal force to any theory attempting to challenge the patent of the Rancho Las Baulines by arguing that, since the decree of confirmation included the sandspit, the patent exclusion of the sandspit was an error which is subject to correction at the present time. Moreover, insofar as the Rancho Las Baulines is concerned, any argument as to what land should have been conveyed based on the decree of confirmation is subject to an additional fatal infirmity. Since the concession of the Rancho Las Baulines was adjudged to be a grant of quantity rather than a grant of description, there no possible way to challenge the description of the land conveyed by the patent by appealing to the decree of confirmation since, insofar as quantity grants were concerned, the decree of confirmation only

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51/ It is useful to note that the United States did not take the position that the land which it contended was improperly included in the survey of the Rancho Las Baulines should be treated as part of the Rancho Saucelito. On the contrary, the United States argued that "[i]f the claimants of the Saucelito have seen fit to take less than the area given to Richardson by the officer who gave possession, the surplus reverts to the U.S. and not to Briones" (Tr. 119). This argument is indicative of the contemporaneous views of the Government attorneys that if the land patented was less than the amount confirmed, the patent, nevertheless, controlled.

established the outer boundaries in which the selection was to be made. It did not, and could not, define the selection itself.

As noted above, the area originally surveyed by Matthewson encompassed four square leagues. Since the grant of the Rancho Las Baulines was determined to be a grant of quantity, 52/ Briones was properly limited to two square leagues of land. Furthermore, while the practice of the Department and the courts was to allow the grantee to make an initial selection of the lands desired out of the larger tract, the United States was invested with the same right that the Mexican government held of ultimately choosing which lands would be conveyed. As the Supreme Court noted in United States v. McLaughlin, 127 U.S. 428, 451 (1888):

[T]he right of location within the larger territory is in the government, and not in the grantee. In such case, the use does not attach to the whole territory, but only to a part of it, and to such part as the government chooses to designate, provided the requisite quantity be appropriated.

Accord Fremont v. United States, supra.

Once it was determined that the grant of the Rancho Las Baulines was a grant of quantity, the government was vested with the right to define the area of the grant within the larger area described. The exclusion of the sandspit, be it intentional or unintentional, is a matter of no moment since

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52/ Unlike the grant of the Rancho Saucelito, the grant of the Rancho Las Baulines was clearly held to be a quantity grant. That the grant of the Rancho Las Baulines was correctly so determined to be a quantity grant we believe is well established by the record. See note 14, supra.

it is uncontroverted that Briones received the full two square leagues to which he was entitled. 53/ Appellees have no more valid a claim to the sandspit which was excluded from the survey than they do to the land ultimately surveyed as the Rancho Punta de los Reyes (Sobrante) to the northwest. Both were within the description used in the decree of confirmation and neither were included in the land patented. That the exclusion of the former may have been the result of inadvertence while the exclusion of the latter was clearly intended makes no difference. Briones' selection rights, limited as they were to two square leagues, were fully recognized in the patent. Having no ultimate right to select the specific lands conveyed, the failure to include any specific parcel provides no basis for any equitable relief. Accordingly, we hold that, even if it were possible to entertain a challenge to a patent on the basis of the decree of confirmation, such a challenge may not be maintained where the concession, itself, was a grant of quantity and, as such, was fully discharged in the patent which issued.

Nor have appellees' submitted anything that would support a conclusion that, contrary to both the Matthewson field notes and the plat of survey, Matthewson was actually on the Pacific Ocean when he established corner T.B. 208, rather than on the shore of Bolinas Bay. The fact that Matthewson expressly referred to his location as "opposite" the sandspit makes it a virtual impossibility to conclude that he crossed the sandspit and actually located the corner on the Pacific shore. How Matthewson came to be where he

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53/ As finally surveyed, the patent to Briones contained a total of 8,911.34 acres, in excess of two square leagues regardless of which of the two values of the vara is used. See note 9, *supra*.

was is an unresolvable mystery; 54/ that he was on Bolinas Bay rather than the Pacific Ocean is a virtual certainty. Appellees have submitted nothing which would support the conclusion that the sandspit passed under the patent of the Rancho Las Baulines. Thus, were this a matter in which the Board was charged with making the initial Departmental interpretation on the issues before us, we would have no choice but to conclude that that part of the Bolinas Sandspit lying above mean high tide was not included in the patents for either the Rancho Saucelito or the Rancho Las Baulines and remains unappropriated Federal land to this day. 55/

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54/ It is interesting to note, however, that had Matthewson used the *diseño* for the Rancho Saucelito in establishing the southern boundary of the Rancho Las Baulines he would have located the corner in approximately the same place as indicated on the plat of survey. Moreover, as located by Lewis, the northwestern boundary of the Rancho Saucelito more clearly accords with the *diseño* which accompanied the request for the grant of the Rancho Las Baulines than the *diseño* which accompanied the request for the grant of the Rancho Saucelito. This could explain how an apparent overlap between the two *diseños* became an apparent hiatus after actual survey.

55/ We note that appellees have also argued that title to the sandspit may be deemed to have vested in the private parties because the land was swamp and overflowed land, granted to the State of California by the Act of Sept. 28, 1850, as amended, 43 U.S.C. §§ 982-994 (1988). See Title Companies' Response at 36-38; Title Companies' Supplemental Response at 9-12. This argument is not tenable for a number of reasons. First of all, it is quite clear that the State never purported to assert a claim to these lands as swamp or overflowed lands (see note 30, supra). While grants under the Swamplands Act were in the nature of in praesenti grants, they required identification by the State before legal title could vest thereunder, even though, when title vested, it would relate back to the date of the grant. See, e.g., Tubbs v. Wilhoit, 138 U.S. 134 (1891); John Stuart Hunt, 31 IBLA 304, 84 I.D. 421 (1977). In the instant case, the official survey returns did not show the lands as swamp and overflowed. Nor did the State ever so identify them. Thus, title cannot be said to have passed under the Act of Sept. 28, 1850.

Moreover, to the extent that appellees argue that the land should now be deemed swamp and overflowed because the spit "was subject to at least occasional tidal inundation and thus qualified as 'overflowed' land" (Title Companies' Supplemental Response at 10), they are wrong as a matter of law. It is well settled that the term "overflowed" as used in the Act of Sept. 28, 1850, does not refer to land subject to periodic overflows but "has reference to a permanent condition of the lands to

[4] But, as our recitation of the factual construct of the appeal makes clear, and as appellees strenuously argue, this case does not arise as a tabula rasa, uncluttered by prior Departmental pronouncements. On the contrary, the very matters which the appellants seek to litigate were themselves presented to the highest officials of the Department in 1904. That this matter was concluded adversely to the position now advocated by appellants cannot be gainsaid. The fact that we have, in our examination above, found the analysis proffered in the John Lawler decision intrinsically flawed does not render the judgments announced therein a nullity. Rather, while that decision stood, it represented the final Departmental word on the matter and was fully binding on all subordinate officials until such time as it was altered or reversed by competent authority.

It is true that, to the extent that this Board has been delegated the full appellate review authority of the Secretary, this Board is vested with authority to reverse prior Secretarial decisions. See, e.g., Ralph F. Rosenbaum, 66 IBLA 374, 89 I.D. 415 (1982), overruling Towl v. Kelly, 54 I.D. 455 (1934) (opinion of First Assistant Secretary Walters); United States v. Winegar, 16 IBLA 112, 81 I.D. 370 (1974), overruling Freeman v. Summers, 52 L.D. 201 (1927) (opinion of Secretary Work); Arizona Public Service Co., 5 IBLA 137, 79 I.D. 67 (1972), overruling in part Keating Gold

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fn. 55 (continued)

which it is applied." Heath v. Wallace, 138 U.S. 573, 584 (1891); see also State of California, 8 IBLA 164 (1972). Finally, absent evidence that the land could be reclaimed for cultivation, the sandspit would not be of the character of lands described in the Swamplands Act. See State of California, 29 IBLA 132 (1977). Thus, the contention that the lands of Bolinas Sandspit passed to the State of California under the auspices of the Swamplands Act must be rejected.

Mining Co., 52 L.D. 671 (1929) (opinion of Assistant Secretary Edwards). <sup>56/</sup> But, the mere existence of such authority does not automatically mandate its exercise, even in those cases where it is shown that the original decision was erroneous. On the contrary, reexamination of questions once decided requires a close weighing of jurisprudential considerations relating to the desirability of accurate and correct decisionmaking and the often conflicting need to determine matters with finality so as to avoid endless litigation and the uncertainties which that engenders. Judged in this scale, we must conclude that it is too late in the day to assert Federal ownership to the Bolinas Sandspit.

Admittedly, the decision of the Acting Secretary in John Lawler indicated that reconsideration of the opinions therein announced might be entertained if "the result of the litigation referred to [Adams v. Mulvaney, *supra*] should furnish any ground for a favorable consideration of his application" (Title Companies' Answer, Exh. A, Subexh. P). This answer paralleled the earlier statement of the Commissioner, GLO, that rejection of Lawler's application "does not preclude him or any other person from applying at any time in due form for the survey of the land, and if it should be hereafter shown that the land is public land of the United States subject to survey and disposal as such, proper action would be taken by this office on such application" (Title Companies' Answer, Exh. A, Subexh. M at 8). But

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<sup>56/</sup> The authority to overrule prior Secretarial decisions has long been exercised by those invested with the responsibility for conducting Departmental adjudications. See, e.g., United States v. Carlile, 67 I.D. 417 (1960) (opinion by Deputy Solicitor Fritz overruling decisions by Secretary Hitchcock and Secretary Smith).

it cannot be seriously contended that either the Commissioner, GLO, or the Acting Secretary contemplated that such action would commence 84 years after their decisions.

There are, it is true, numerous decisions of both the Department and the Federal courts standing for the proposition that the failure of the government surveyors to extend the lines of the public land surveys over Federal land does not divest the United States of title thereto. See, e.g., Scott v. Lattig, 227 U.S. 229 (1913); United States v. Ruby Co., 588 F.2d 697 (9th Cir. 1978); Ritter v. Morton, 513 F.2d 942 (9th Cir. 1975); Exxon Corp. v. BLM, 118 IBLA 38 (1991); Roland Oswald, 35 IBLA 79 (1978). Certainly, had there been no Departmental adjudication relating to the question of ownership of the Bolinas Sandspit, the mere passage of time, even if coupled with the general belief of those occupying and improving the sandspit that the land had been patented, would not be sufficient to divest the United States of its title to the sandspit once it were shown that the land had never actually passed from Federal ownership. But, the essential factor which differentiates the instant appeal from the vast majority of other cases involving the question of whether a specific parcel of land is Federally owned is the rendition by the Acting Secretary of the John Lawler decision, disclaiming any Federal ownership interest in the sandspit.

We recognize that the State of California has argued before the Board that it was not until it raised the question of possible Federal ownership of the sandspit with BLM that the decision in John Lawler, which was

unpublished, was asserted as evidence of title. See State of California's Response at 8, n. 3. But the fact that present litigants may have been unaware of the decision in that case does not directly bear on the question whether past actions had occurred in reliance on the decision. More fundamentally, the doctrine of administrative finality, like its judicial counterpart res judicata, while related to equitable estoppel, operate independently of any requirement that actual reliance on the decision be established. Rather, administrative finality is grounded in considerations of repose and in the recognition that, as the lapse in time from the initial decision increases, the ability to fairly redetermine the underlying facts becomes increasingly diminished. Thus, the court recognized in Gabbs Exploration Co. v. Udall, 315 F.2d 37, 41 (D.C. Cir. 1963), a decision affirming the refusal of the Department to reopen proceedings conducted 27 years earlier, which had resulted in a default judgment against various oil placer mining claims:

There might be some reason to impel the Secretary to reopen a prior decision in order to purge an incorrect determination, but the passage of time might prevent or greatly hinder a proper determination of the initial question, in which case it would be inappropriate for him to reopen the case even though he retains jurisdiction over the land in dispute. This is such a case, for it is now difficult, if not impossible, for the Secretary to determine the facts as to the original abandonment in 1929.

This concern certainly obtains in the present case.

We have noted above that, were we to consider the questions presented in John Lawler under a de novo review, we would conclude that the Bolinas Sandspit did not pass under either the grant of the Rancho Saucelito or the

Rancho Las Baulines. Such a conclusion, however, would not merely involve the Seadrift development but would almost certainly include some, if not all, of the Upton tract, and, possibly, the Robinson tract as well. Nor would this end the matter. In order to fix the limits of Federal ownership, it would still be necessary to reestablish the precise location of both corner T.B. 208 of the survey of the Rancho Las Baulines and corner S 58 of the Rancho Saucelito. That this might prove to be a difficult task is obvious from a review of the proceedings in Curtis v. Upton, supra, where the trial court was singularly unable to locate corner T.B. 208. The passage of 78 years since that decision would not work to make such a determination easier. Even assuming that these two corners might be reestablished, the consequences could be far-reaching indeed.

In all its pleadings, the State has assumed that corner S 58 is located on the same boundary line as is corner T.B. 208. While it certainly was the intent of the two surveyors to proceed down the same line, the distance calls of the two surveys are irreconcilable. Thus, Lewis proceeded from the shore of the Pacific Ocean on a bearing of N.  $55\frac{1}{4}^{\circ}$  E. traveling a distance of 101 chains before arriving at what he determined was the southeastern corner of the Rancho Las Baulines. Matthewson, presumably starting from that corner, surveyed his line S.  $55\frac{1}{4}^{\circ}$  W. covering a distance of 119 chains before arriving at Bolinas Bay. It is, of course, an impossibility for Matthewson to travel from the same point and on the same line that Lewis traversed and arrive at Bolinas Bay 1188 feet beyond the point where Lewis commenced his line on the shore of the Pacific Ocean. Either one of the distance calls was wrong, or one of the courses was wrong, or the two

surveyors started at different points. Unless the error is determined to be in the distance calls, a resurvey would probably result in the location of a hiatus affecting not merely the Bolinas Sandspit but possibly the entire length of the Rancho Las Baulines grant. Needless to say, numerous individuals, total strangers to the instant litigation who never had any reason to doubt that they owned their land, might suddenly find their titles in jeopardy.

It is because of these types of consequences that courts have long recognized that title questions, once decided, should remain so. Thus, the Supreme Court noted:

Where questions arise which affect titles to land it is of great importance to the public that when they are once decided they should no longer be considered open. Such decisions become rules of property, and many titles may be injuriously affected by their change \* \* \* [W]here courts vacillate and overrule their own decisions \* \* \* affecting the title to real property, their decisions are retrospective and may affect titles purchased on the faith of their stability. Doubtful questions on subjects of this nature, when once decided, should be considered no longer doubtful or subject to change.

Nevada v. United States, 463 U.S. 110, 129 n.10 (1983), quoting Minnesota Co. v. National Co., 70 U.S. (3 Wall.) 332, 334 (1866). Inasmuch as reconsideration of the 1904 John Lawler decision at this late date could have immense consequences, not all of which can be foreseen at the present time, 57/ and in recognition of the length of time which has passed since

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57/ Thus, while the State of California has suggested that the homeowners on the sandspit could avail themselves of the Color of Title Act, 43 U.S.C. § 1068 (1988), it has, at the same time, pointed to various documents which, it contends, show that the appellees were aware of the Federal interest in

that decision was issued, we think invocation of the doctrine of administrative finality within the context of the present appeal is fully warranted. Accordingly, we will not disturb the determination announced by the Acting Secretary in John Lawler that there is no Federal ownership interest in lands on the Bolinas Sandspit.

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 affirmed as modified for the reasons stated herein.

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James L. Burski  
Administrative Judge

I concur:

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Bruce R. Harris  
Deputy Chief Administrative Judge

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fn. 57 (continued)

the sandspit. See, e.g., State of California's Additional SOR at 84-85. However, a sine qua non for relief under the Color of Title Act, supra, is a requirement that the applicant show that the land was acquired and held in good faith, viz., without knowledge of the claim of the United States to the land. See, e.g., Lawrence E. Willmorth, 64 IBLA 159 (1982); John S. Cluett, 52 IBLA 141 (1981). It is, therefore, by no means clear that all or any of the landowners would qualify under the Color of Title Act, which, in any event, would only permit them to purchase the land at fair market value less such equities as are deemed warranted. See generally Benton C. Cavin, 83 IBLA 107 (1984).

