



CITY OF NORTH LAS VEGAS

178 IBLA 377

Decided February 24, 2010



United States Department of the Interior
Office of Hearings and Appeals
Interior Board of Land Appeals
801 N. Quincy St., Suite 300
Arlington, VA 22203

CITY OF NORTH LAS VEGAS

IBLA 2009-290

Decided February 24, 2010

Appeal from a decision of the Las Vegas (Nevada) Field Office, Bureau of Land Management, rejecting a portion of a right-of-way grant offer on the ground that the land subject to the rejected portion had been patented. N-85013.

Affirmed.

1. Patents of Public Lands: Effect

Issuance of a patent for land over which a third party had applied for a right-of-way divests the Department of jurisdiction to determine whether the right-of-way applicant had a valid existing right to a right-of-way at the time the patent was issued, and deprives this Board of jurisdiction to direct the Bureau of Land Management to issue a right-of-way to the applicant.

2. Federal Land Policy and Management Act of 1976: Correction of Conveyance Documents--Patents of Public Lands: Corrections

The Bureau of Land Management's failure to protect a third party's asserted valid existing right to a right-of-way for which that party had applied, and the Bureau's alleged failure to follow proper procedures, in issuing a patent that was not subject to the applied-for right-of-way are asserted errors of law, not mistakes of fact, and are not grounds on which the patent could be administratively corrected.

APPEARANCES: Lorena Candelario, Manager, Real Property Services, City of North Las Vegas, for appellant; Luke Miller, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Sacramento, California, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HEATH

The City of North Las Vegas, Nevada (City), has appealed a June 22, 2009, decision of the Las Vegas (Nevada) Field Office (LVFO), Bureau of Land Management (BLM) (Decision), rejecting a portion of a right-of-way (ROW) grant that BLM previously had offered to the City, because the land within the rejected portion had been patented to the State of Nevada. For the reasons explained below, we affirm.

Background

In 1987, BLM, through publication of a notice of realty action in the *Federal Register*, informed the public that certain Federal land, including all of sec. 15, T. 19 S., R. 62 E., Mount Diablo Meridian (MDM), Clark County, Nevada, was “classified as suitable for lease/purchase under the Recreation and Public Purpose[s] Act” (R&PP Act), 43 U.S.C. §§ 869 through 869-4 (2006), for use as an armory complex. 52 Fed. Reg. 27591 (July 22, 1987). BLM granted the State of Nevada’s R&PP Act application, serialized as N-43395, and leased lands including section 15 to the State for that purpose. The lease was executed on September 21, 1988. Section 1 of the lease granted the State an option to purchase the leased lands.¹ September 21, 1988, Lease, Administrative Record (AR) N-43395, Vol. 1, at 1. Section 4(i) of the lease provided that “nothing contained in this lease shall restrict the acquisition, granting, or use of permits or rights-of-way under existing laws by an authorized Federal officer.” *Id.* at 2.² The lease was renewed from time to time, most recently on March 15, 2005. AR N-43395, Vol. 5.

The State advised BLM that it wanted to exercise its right to purchase section 15 by letter dated March 17, 1997. AR N-43395, Vol. 3. However, funding for the purchase was not approved by the Nevada State legislature until July 2005. 2005 Nev. Stat. 1544; see e-mail from Thomas McElroy, Project Manager, to BLM dated April 11, 2006, AR N-43395, Vol. 5. In late 2007, the State informed BLM that it was ready to purchase and obtain a patent for section 15. See e-mail from State Land Agent to BLM dated November 16, 2007, AR N-43395, Vol. 5; Answer Ex. 2.

On March 10, 2008, under section 501 of the Federal Land Policy and Management Act (FLPMA), 43 U.S.C. § 1761 (2006), and implementing regulations

¹ Though not specifically cited in the lease instrument, the authority to sell the leased lands to the State is in section 2 of the R&PP Act, 43 U.S.C. § 869-1 (2006).

² The lease also was subject to all valid existing rights. At the time the lease was executed, section 15 was subject to ROW grants, listed in Attachment A to the Lease Addendum, for railroad, power line, access road, highway, and material site purposes.

at 43 C.F.R. Part 2800, the City submitted to BLM an application for an ROW grant to construct public roads and utilities over Federal lands in secs. 13, 14, and 15, T. 19 S., R. 62 E., MDM, and sec. 18, T. 19 S., R. 63 E., MDM, which BLM serialized as N-85013. March 10, 2008, ROW Application, AR N-85013.³ One segment of this proposed ROW was in the SE $\frac{1}{4}$ of section 15 and the SW $\frac{1}{4}$ of section 14, beginning at the corner of secs. 14, 15, 22, and 23, T. 19 S., R. 62 E., MDM, and running north along the boundary of sections 14 and 15 for approximately one-half mile, with a width of 80 feet. The west 40 feet of this strip was in section 15 and overlapped the R&PP Act lease held by the State.

The purpose of the requested ROW was to extend Hollywood Boulevard, a public street running north and south, as well as Farm Road (a street running east and west perpendicular to and intersecting Hollywood Boulevard) to provide access to the planned Apex Commercial and Industrial Park to the northeast in Ts. 18 and 19 S., R. 63 E., MDM. The strip in sections 14 and 15 was the proposed Hollywood Boulevard extension.⁴

On August 25, 2008, the City requested the State's concurrence in the ROW request. "As the City understands the process, concurrence from the State would allow BLM as the underlying land owner to issue a right-of-way." Application for a Permit, License or Other Authorization to Use State Land dated August 25, 2008, AR N-85013, at unpaginated (unp.) 1. The State, however, did not respond at that time.

After conducting an environmental analysis for the City's application, BLM issued an Environmental Assessment, Finding of No Significant Impact, and Decision Record (DR) on September 23, 2008. BLM "determined that the proposed action is in conformance with the approved land use plan," and decided to "implement the proposed action." DR, AR N-85013, at 9. Based on the DR, BLM issued a decision to the City on the same day. Enclosed with the decision were two copies of an ROW grant instrument for the City's signature.

³ The AR for the ROW application consists of one file folder of documents labeled "NVN 085013 Vol. 1." The documents are not tabbed or serially paginated with "Bates stamp" numbers. Because there is only one folder, it is unnecessary to cite to a volume number. The documents in the AR therefore will be cited by the date and name or description of the document. The citations to AR N-43395 are to the record pertaining to the State's R&PP Act lease and subsequent patent, discussed below.

⁴ On May 15, 2008, the City submitted an amended ROW application that added a strip of land for an additional proposed future street as part of providing access to the Apex Commercial and Industrial Park. AR N-85013. That amendment did not affect the segment of the requested ROW in sections 14 and 15 at issue here.

The decision stated: “Upon receipt of the signed [ROW grant] documents we will issue the right-of-way grant, absent any other unresolved issues. . . . The issuance of this grant is contingent upon receipt of a concurrence letter from the State of Nevada.” Decision dated September 23, 2008, AR N-85013, at unp. 1.⁵ BLM set no time limit for receipt of the State’s concurrence, but did require the City to return the signed documents within 30 days of the decision’s date. The City’s representative signed the copies of the ROW grant on September 30, 2008, and BLM received them on October 1, 2008. AR N-85013.

A BLM memorandum dated October 30, 2008, states that the agency began conducting a land status search in preparation for patenting section 15 to the State. The search reminded BLM of the City’s pending ROW grant application. *See* BLM e-mail dated November 4, 2008, AR N-43395. Yet, on December 29, 2008, while still awaiting the State’s response to the City’s application for concurrence in the ROW grant for section 15, and with the City’s ROW application still pending (BLM had not signed the grant in the absence of the State’s concurrence), BLM nevertheless issued Patent No. 27-2009-003 to the State for all of section 15. AR N-43395, Vol. 5; Statement of Reasons (SOR) attachment. The patent was subject to “[v]alid existing rights.” Patent at 2. The City’s ROW application was not mentioned in the patent.

On January 27, 2009, even though it had issued the patent approximately one month earlier, BLM wrote to the State to inquire regarding its concurrence in the City’s ROW request:

The City of North Las Vegas wanted to utilized [sic] a portion of your R&PP Lease The City of North Las Vegas has been awaiting a little over four months for a concurrence letter from the State of Nevada. BLM is also awaiting the concurrence letter as well. We are at the point to issue the Right-of-way to the City of North Las Vegas within the next ten days. It would be very kind of the State of Nevada to send the City of North Las Vegas and BLM a concurrence letter within ten days.

E-mail from BLM Realty Specialist, LVFO, to State Land Agent dated January 27, 2009, AR N-85013. The e-mail did not mention the patent.⁶

⁵ The grant instrument described the ROW to be granted in perpetuity as including the “right to construct, operate, maintain and terminate a road, drainage, and municipal utility right-of-way on public lands” in E $\frac{1}{2}$ E $\frac{1}{2}$ SE $\frac{1}{4}$ sec. 15, T. 19 S., R. 62 E., MDM. Right-of-Way Grant/Temporary Use Instrument N-85013, AR N-85013, at unp. 1.

⁶ While this e-mail is part of the record, it is not clear that the State ever received it.

(continued...)

On March 6, 2009, BLM received a letter from the State regarding the ROW application. The State opposed granting an ROW in section 15. The State first explained that it did not view the City's application as consistent with the National Guard's plans to develop the property, and said that the proposed ROW may have negative implications for managing the property as a military site. March 3, 2009, letter, AR N-85013, at unpag. 1. The State then requested that BLM "acknowledge the rights that accompany our [sic] patent[]" for section 15 and "refrain from further processing of the rights-of-way or easement applications" pending completion of a joint land use study for the National Guard facility. *Id.*

On June 22, 2009, BLM issued the Decision, rejecting the City's ROW grant offer for the segment of the requested ROW within section 15. BLM explained to the City that it had received the State's letter, and, "[d]ue to the State's concern regarding the [City's] proposed [land] use," and because the "lands are now patented," the agency could not issue the ROW grant for that segment. Decision, AR N-85013 and SOR attachment, at unpag. 1.

The City appealed. It objects to BLM having issued the patent before resolving the City's interests in the ROW application and asserts that doing so was procedurally improper in various respects. SOR at 3. The City argues that BLM "failed to protect the subject right-of-way as a valid and existing right." *Id.* The City requests "that BLM be directed to issue right-of-way N-85013 as requested by the City, and to correct patent 27-2009-003 as subject to that right-of-way." *Id.*

Analysis

I. The Board Has No Jurisdiction to Adjudicate Whether the City Holds a Valid Existing Right or to Direct BLM to Issue a Right-of-Way.

In this case, the patent was made "subject to" valid existing rights and six Federally-granted ROWs specifically identified in the patent. Patent at 2. The patent did not identify a potential future ROW to be issued to the City. Nor did the United States reserve in that conveyance the property interest necessary for BLM to issue such an ROW in the future. In *State of Alaska v. Thorson (On Reconsideration)*, 83 IBLA 237, 91 I.D. 331 (1984), the Director of the Office of Hearings and Appeals explained:

The words "subject to" in conveyances have ordinarily been interpreted to mean "subordinate to," "subservient to," "limited by," or "charged

⁶ (...continued)

The copy in the AR is accompanied by a "Delivery Failure Report," stating that the "document was not delivered."

with.” *They do not connote a reservation or retention of property rights in the grantor.* Thus, they are terms of limitation or qualification, putting the grantee on notice that he may be receiving less than a fee simple.

83 IBLA at 244 (emphasis added). Thus, the Federal Government retained no property interest in any “valid existing right” to which the patent was subject. In the absence of any reservation in the patent of a property interest corresponding to the ROW the City applied for, there is no interest that the Federal Government could now convey to the City in the form of an ROW.

[1] Moreover, it is a long-established principle that patenting the land out of Federal ownership divests the Department of jurisdiction to determine the rights of parties to that land, including recognition of conflicting claims to those lands. *E.g.*, *Germania Iron Co. v. United States*, 165 U.S. 379, 383 (1897); *Alyeska Pipeline Service Co.*, 175 IBLA 1, 2 (2008); *Eddie S. Beroldo*, 123 IBLA 156, 158, 163 (1992); *Rosander Mining Co.*, 84 IBLA 60, 62 (1985); *Henry J. Hudspeth, Sr.*, 78 IBLA 235, 238 (1984). Therefore, the Department, including this Board, has no jurisdiction to adjudicate whether the City had a valid existing right to an ROW at the time section 15 was patented to the State.⁷ It necessarily follows that the Board also has no jurisdiction to direct BLM to issue an ROW to the City.

II. The City Has Not Shown a Mistake of Fact that Would Support Correction of the State’s Patent.

[2] As noted above, the City asks the Board to direct BLM “to correct patent 27-2009-0003 as subject to” the ROW the City asserts as its “valid existing right.” SOR at 3. Section 316 of FLPMA, 43 U.S.C. § 1746 (2006), provides in relevant part:

The Secretary may correct patents or documents of conveyance issued pursuant to section 1718 of this title or to other Acts relating to the disposal of public lands where necessary in order to eliminate errors. In addition, the Secretary may make corrections of errors in any documents of conveyance which have heretofore been issued by the Federal Government to dispose of public lands. . . .

The regulations define “error” for purposes of these provisions as

the inclusion of erroneous descriptions, terms, conditions, covenants, reservations, provisions and names or the omission of requisite

⁷ Any claim by the City that it possesses a valid existing right to an ROW as against the State would have to be resolved in litigation between the City and the State in a court of competent jurisdiction.

descriptions, terms, conditions, covenants, reservations, provisions, and names either in their entirety or in part, in a patent or document of conveyance *as a result of factual error. This term is limited to mistakes of fact and not of law.*

43 C.F.R. § 1865.0-5(b) (emphasis added).⁸ Mistakes of fact include such errors as including land the Government and the patentee had not intended to be conveyed, excluding land intended to be conveyed, and mistakes in boundaries or legal descriptions. *E.g.*, *Gordman Leverich L.L.P.*, 177 IBLA 52, 60 (2009); *Ramona and Boyd Lawson*, 159 IBLA 184, 190 (2003), and cases cited. Requests to correct errors in patents resulting from alleged errors of law uniformly have been rejected. *E.g.*, *Seldovia Native Association*, 173 IBLA 71 (2008); *Steve H. Crooks*, 167 IBLA 39, 44 (2005); *Lloyd Schade*, 116 IBLA 203, 208 (1990); *Walter and Margaret Bales Mineral Trust*, 84 IBLA 29, 32 (1984).

In addition to failing to protect its asserted valid existing right, the City argues that BLM “failed to act on the right-of-way application after receiving the signed offer from the City” and “failed to follow its policies and procedures” by issuing the patent before resolving the City’s ROW application and before obtaining the State’s position on the application. SOR at 3. BLM also allegedly “failed to notify the City as an affected interest [sic]” of the decision to issue the patent, “which removed any opportunity for the City to comment on, object to, or protest the patent issuance.” *Id.* BLM argues that the City “cites to no policy or procedure BLM failed to follow” and further disputes the substance of the alleged procedural errors. BLM Response at 7. BLM also maintains that the asserted errors are legal questions, not factual errors that could constitute a basis for patent correction under 43 C.F.R. § 1865.0-5(b). *Id.*

The City’s argument that BLM should have resolved the City’s ROW application before issuing the patent is not without merit. *See Nelbro Packing Co.*, 5 AN CAB 174, 88 I.D. 352, 359 (1981); *Matanuska-Susitna Borough, Inc.*, 38 IBLA 382, 383 (1979); *Everett Elvin Tibbetts*, 61 I.D. 397, 401 (1954). Nevertheless, such an error is an

⁸ BLM did not explain its reasons for limiting correction of errors to factual errors either in the preamble to the proposed rule or in the preamble to the final rule. *See* 47 Fed. Reg. 19060 (May 3, 1982) (proposed rule) and 49 Fed. Reg. 35296 (Sept. 6, 1984) (final rule). But BLM’s intent is clear not only from the plain language of the regulation, but also from the change in the definition’s language between the proposed rule and the final rule. The proposed rule defined “error” as inclusion of erroneous descriptions, terms, conditions, etc., in a patent or document of conveyance “as a result of factual error or unintentional or inadvertent deviation from statutory or regulatory requirements.” 47 Fed. Reg. at 19062. The final rule changed this to “as a result of factual error” and specified that errors do not include mistakes of law, as quoted above. 49 Fed. Reg. at 35299.

alleged error of law, not a mistake of fact. An asserted failure to protect a valid existing right, failure to issue a decision on the ROW application, and asserted failure to follow required procedures in considering the ROW application, are all arguments that the agency acted improperly in a legal sense. The omissions of which the City complains resulted from a neglect of legal duties. These are asserted errors of law, not mistakes of fact. Thus, even if BLM committed legal error in issuing the patent to the State, we could not direct BLM to administratively correct that patent.⁹

As we observed in *Rosander Mining Co.*, “[w]here a patent has been issued through mistake or error of law by the Department, remedy may be sought through a suit brought by the United States in Federal court to annul or vacate the patent.” 84 IBLA at 64. We express no view or recommendation regarding whether the Government should do so under the present circumstances.

Conclusion

For the reasons explained above, issuance of the patent deprived the Department of jurisdiction to determine whether the City possessed a valid existing right or to direct BLM to issue an ROW. Further, the alleged errors involved in issuing the patent are errors of law and not mistakes of fact and cannot serve as a basis to correct the patent.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decision appealed from is affirmed.

_____/s/
Geoffrey Health
Administrative Judge

⁹ An additional principle applies in this case because the City is not the patentee. Where a party who is not the patentee seeks administrative correction of a patent, the Department cannot proceed with a patent correction without the consent of the patentee whose rights would be affected. *Rosander Mining Co.*, 84 IBLA at 64. *See also Lone Star Steel Co.*, 101 IBLA 369, 373 (1988). Even if a mistake of fact were involved here, one would not expect the State’s consent to be forthcoming in view of its opposition to the ROW.

I concur:

_____/s/
James K. Jackson
Administrative Judge