



DONALD C. & REBECCA B. ROUTSON

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Decided May 17, 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

DONALD C. & REBECCA B. ROUTSON

IBLA 2008-266

Decided May 17, 2010

Appeal from a decision of the Arizona State Office, Bureau of Land Management, rejecting an application to correct Patent No. 553625. AZPHX02221601.

Affirmed.

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

Under section 316 of FLPMA, 43 U.S.C. § 1746 (2006), the Secretary may correct errors in any documents of conveyance issued to dispose of public lands. Errors in patents or documents of conveyance are defined as the inclusion of erroneous descriptions, terms, conditions, covenants, reservations, provisions, and names or the omission of requisite 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. Errors in patent are limited to mistakes of fact. Before BLM's discretion can be exercised it must clearly appear that an error in fact was made. Otherwise, an application to correct patent will be barred as a matter of law.

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

To show entitlement to a patent correction under section 316 of FLPMA, an applicant must show by a preponderance of evidence that there was an error of fact that requires correction. If an error is shown, the applicant then must demonstrate that considerations of equity and justice favor such correction. When an error is shown, the Department will correct a patent, provided the

concerned Federal administrative agency does not object, the Government's interests are not unduly prejudiced, no third party rights are adversely affected, and substantial equities of the applicant will be preserved.

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

Cultivation of Forest Service lands outside the boundaries of a homestead patent does not *ipso facto* establish that the entryman intended to enter and earn any such lands so as to impute a correctable mutual mistake of fact in describing the lands patented to him. Where the record as a whole shows that any such encroachment, if it occurred, was nothing more than a trespass, a BLM decision denying a request for a patent correction will be affirmed.

APPEARANCES: Donald C. and Rebecca B. Routson, Prescott, Arizona, *pro sese*; Wonsook S. Sprague, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Phoenix, Arizona, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE PRICE

Donald C. and Rebecca B. Routson, husband and wife, have appealed from and petitioned for a stay of the effect of an August 27, 2008, decision of the Arizona State Office, Bureau of Land Management (BLM), rejecting their application to correct Patent No. 553625, serialized as AZPHX02221601, pursuant to section 316 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1746 (2006), and its implementing regulations in 43 C.F.R. Subpart 1865. The Routsons seek to correct a patent that was issued to a homestead entryman to add two tracts of land. By order dated February 3, 2009, the Board granted the requested stay.

Because we find that the Routsons have not demonstrated by a preponderance of the evidence any error of fact or law in BLM's decision, we affirm the decision.

Background

Joseph Chiantaretto submitted two applications for homestead entry. The first application was for 120 acres described as the NE $\frac{1}{4}$ SE $\frac{1}{4}$, SE $\frac{1}{4}$ SE $\frac{1}{4}$, S $\frac{1}{2}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$, S $\frac{1}{2}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$ of sec. 22, T. 16 N., R. 4 W., Gila and Salt River Meridian (GSRM), and was filed on June 14, 1913. He filed a second application for 20 acres on September 3, 1914, describing the land as the N $\frac{1}{2}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$ of sec. 22, T. 16 N., R. 4

W., GSRM. On the ground, the tracts are located in a “stair-step” pattern, generally following a sandy wash that traverses those lands from the southwest to the northeast. Patent No. 553625 was issued by the United States on November 9, 1916, for 140 acres of surveyed land situated in Yavapai County, Arizona, in the Prescott National Forest, described as the NE $\frac{1}{4}$ SE $\frac{1}{4}$, S $\frac{1}{2}$ SE $\frac{1}{4}$, and the S $\frac{1}{2}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$ sec. 22, T. 16 N., R. 4 W., GSRM, pursuant to the Homestead Act of May 20, 1862, ch. 75, 12 Stat. 392, *as amended*.¹ The lands in the patent were described by legal subdivisions as officially surveyed by S.W. Foreman, U.S. Deputy Surveyor, General Land Office (GLO), in the original 1871 survey of the subdivisional lines of the township. At each quarter-section and section corner of sec. 22, he set a marked wood post in the ground, in accordance with applicable instructions. Foreman Field Notes, Book 1049 at 59. The survey field notes for the subdivisional lines were approved February 15, 1871, and the survey plat was officially filed on March 12, 1872.

The subdivisional lines were dependently resurveyed by Sidney E. Blout, U.S. Cadastral Engineer, GLO, in 1924, resulting in a re-establishment of all of the quarter-section and section corners of sec. 22. Not recovering any of the original subdivisional corners of the 1871 survey for sec. 22, Blout re-established these corners by proportionate measurement, using other existing corners. Blout noted that “[t]he soil of the bottom lands along the sand washes in secs. 10, 15, 22, 27, and a small portion of 16 and the greater portion of Williamson Valley is a dark sandy loam and nearly all be classed as 1st. rate and will produce good crops without the aid of irrigation.” Blout Field Notes, Book 3740 at 73. He characterized the land in the rest of the township as “either hilly or mountainous,” consisting of third rate “stony clay loam unfit for agricultural purposes.” *Id.* He noted that the township is drained by several large sand washes that enter from the south and by Humphrey’s Wash (now called Williamson Valley Wash) on the west boundary of sec. 6, flowing in a “general easterly and northeasterly direction” to empty into the Williamson Valley. *Id.* The resurvey field notes were approved December 28, 1926, and the resurvey plat was officially filed on May 15, 1928.

The Routsons acquired 40 of the original 140 patented acres, described as the W $\frac{1}{2}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$ and S $\frac{1}{2}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$ sec. 22, by Joint Tenancy Deed dated January 22, 1982. Answer, Ex. A. They admit that they acquired this land from Harry Chiantaretto, a son of the entryman, without the benefit of a prior survey. Notice of

¹ The Homestead Act was repealed effective Oct. 21, 1976, by sections 701(a) and 702 of FLPMA, Pub. L. No. 94-579, 90 Stat. 2743, 2786-89 (1976), subject to valid existing patents. The Act had provided for the entry and patenting of “one-quarter section, or a less quantity, of unappropriated public lands, to be located in a body in conformity to the legal subdivisions of the public lands[.]” 43 U.S.C. § 161 (1970); *see* 43 U.S.C. §§ 162-164 (1970).

Appeal (NA) at 3; Letter to BLM dated Nov. 21, 2006 (Patent Correction Application), at 4.

The Routsons allege that from 1985 to 1988 they installed an underground irrigation system “at a cost in excess of fifty thousand dollars.”² The Routsons assert that installation of the system was designed with the assistance of the Soil Conservation Service (SCS), U.S. Department of Agriculture, and that SCS performed a government survey.³ NA at 3; *see* Patent Correction Application at 4.

In 1994, the Forest Service notified the Routsons that an administrative survey had determined that their underground irrigation system and associated acres of irrigated farm lands were in trespass on National Forest lands adjoining the private lands in sec. 22 conveyed to Chiantaretto, to which the Routsons succeeded in part.⁴ *See* Patent Correction Application at 4; BLM Answer at 3. The trespassed lands are situated in secs. 22 and 27, T. 16 N., R. 4 W., GSRM, Yavapai County.

The Routsons did not deny the trespass, but sought to acquire the National Forest lands pursuant to the Small Tracts Act, 16 U.S.C. §§ 521c-521i (2006), and the Forest Service’s implementing regulations, 36 C.F.R. Part 254, Subpart C, in 2000. *See* Patent Correction Application at 4; BLM Answer at 3. That Act and regulations authorize the Forest Service, in accordance with the public interest, to resolve land disputes and management problems involving, *inter alia*, encroachments on National Forest land, by virtue of improvements occupying the land under claim or color of title, by conveying the affected land. The Forest Service denied the Small Tracts Act application in 2005, requiring removal of the underground irrigation system by December 31, 2007.

² The record does not include documentation of the expenditures alleged by the Routsons.

³ The Routsons have submitted three maps, with their patent correction application and on appeal, all of which are said to have been prepared by “government surveyors” with SCS in 1964 and 1985. NA at 3; *see* Attachments 7.4.3 and 7.4.4 to Patent Correction Application; Attachment to NA.

⁴ The administrative survey was not an official survey of the United States, since the Forest Service does not have official surveying authority. Hence, it did not formally re-establish any of the surveyed corners and lines. *Mark Einsele*, 147 IBLA 1, 12 (1998); *Benton C. Cavin*, 83 IBLA 107, 130-31 (1984).

The Routsons then engaged Lauri Hopps, a registered private land surveyor, to survey their patented lands in September 2006.⁵ The survey undertook to “define” two separate tracts of land (denominated on the plat as Tracts A and B) reportedly bounded by “an existing barbed wire fence and established property boundary lines,” adjacent to the patented land in the S¹/₂SE¹/₄SW¹/₄ sec. 22.⁶ Attachment 8 to Patent Correction Application. Hopps surveyed and monumented the barbed wire fence enclosing Tracts A and B, which, with the officially surveyed lines of S¹/₂SE¹/₄SW¹/₄ sec. 22, almost completely define the two tracts. The private survey was filed for record with the Yavapai County Recorder on October 17, 2006. Hopps recovered the official east and west quarter-section corners of sec. 22, thus establishing the east-west center line of sec. 22, and also the official southeast and southwest corners and south quarter-section corner, which together defined the subdivisional line between secs. 22 and 27. She also recovered monuments set by the Forest Service that, with the south quarter-section corner of the section, marked the lines of the S¹/₂SE¹/₄SW¹/₄ sec. 22 originally patented to Chiantaretto and later conveyed to the Routsons.

On January 23, 2007, the Routsons filed a letter dated November 21, 2006 [sic], and addressed to a BLM adjudicator for land patents as their application to correct Patent No. 553625 based on the “[d]iscovery of surveyor errors[.]” Patent Correction Application at 4. They sought to add the 18.41 acres of land in Tracts A and B to the Patent, alleging that the original entryman had “actually earned” those lands, which were “not included in the original patent because of a chain of errors beyond the control of the entryman.” *Id.* at 1. They contend that “[t]he lands have been improved and in use continuously since the original homesteader was granted the patent in 1916.” *Id.* at 2.

In its August 2008 decision, BLM addressed each point raised by the Routsons. BLM rejected their patent correction application, concluding that they had failed to establish, by a preponderance of the evidence, the existence of any error in the 1916 patent.⁷ BLM held that the original 1871 survey was incorporated in the 1916 patent and must be held to have correctly established the corners of sec. 22,

⁵ A copy of the private survey plat is attached to the Routsons’ Patent Correction Application as Attachment 8.

⁶ Hopps places all of Tract A, which was found to encompass 15.91 acres, within the S¹/₂NW¹/₄SE¹/₄, S¹/₂NE¹/₄SW¹/₄, N¹/₂SE¹/₄SW¹/₄, and E¹/₂SW¹/₄SW¹/₄ sec. 22, and all of Tract B, which was found to encompass 2.50 acres, within the N¹/₂NE¹/₄NW¹/₄ sec. 27.

⁷ The record provided by BLM includes copies of documents underlying Patent No. 553625. According to the published notice of Chiantaretto’s intention to make final proof, he was to rely upon four witnesses to support his entry. The record includes the witness statements of only two of the four named witnesses.

which thus defined the patented lands, regardless of any error in the survey. BLM further held that the 1924 resurvey re-established those corners in their true original positions according to the best available evidence, and that the resurvey was administratively final for the Department and no longer subject to review by the Department. BLM stated that the fact that the original entryman or a successor-in-interest erected improvements or otherwise “used government lands outside of the patent does not, in and of itself, indicate that there was an error in the original conveyance document” or establish any bona fide rights to the land which must be protected in a resurvey pursuant to 43 U.S.C. § 772 (2006), also noting that the entryman had made no effort to challenge the resurvey or to seek amendment of his patent to include lands he had intended to enter when the 1924 resurvey was performed. Decision at 3.

The Routsons filed a timely appeal from the State Office’s August 2008 decision, requesting a stay of the effect of the decision during the pendency of their appeal.⁸ As noted, that stay request was granted. The Routsons ask the Board to reverse BLM’s decision and grant the application so that the patent encompasses the lands in trespass.

BLM filed its Answer to the statement of reasons for appealing set forth in the NA and, accordingly, the matter is ripe for adjudication.

Discussion

[1] Section 316 of FLPMA provides that the Secretary of the Interior “may correct patents . . . where necessary in order to eliminate errors.” 43 U.S.C. § 1746 (2006); see 43 C.F.R. § 1865.0-3. It provides BLM, as the delegate of the Secretary, the discretionary authority to correct patents of public land to eliminate mistakes of fact as to, *inter alia*, the descriptions of the lands conveyed in the patent documents. 43 C.F.R. § 1865.0-1; *Foust v. Lujan*, 942 F.2d 712, 714-17 (10th Cir. 1991), *cert. denied*, 503 U.S. 984 (1992); *Mary D. Hancock*, 150 IBLA 347, 350 (1999); *Ben R. Williams*, 57 IBLA 8, 12 (1981). The exercise of this discretionary authority is an extraordinary remedy. *Mary D. Hancock*, 150 IBLA at 350.

⁸ The Routsons indicate that BLM, and now the Board, should consider the implications of Congressional policy, as enunciated in the Farmland Protection Policy Act, 7 U.S.C. §§ 4201-4209 (2006), for the present case. See NA at 3-4. They argue that this policy directs Federal agencies to “take steps to assure that the actions of the Federal Government do not cause United States farmland to be irreversibly converted to nonagricultural uses.” 7 U.S.C. § 4201(a) (2006). The unintended consequence of converting farmland to nonagricultural use is not relevant to the question of whether a patent correction is warranted under FLPMA.

To justify the extraordinary remedy of a patent correction, an applicant first must show by a preponderance of evidence that the patent contains an error of fact in the description of the land conveyed, the result of including land the patentee and the United States had not intended to be conveyed and/or by excluding land the patentee and the United States had intended to be conveyed: “If both the United States and [the original entryman] intended that the land on which [the entryman] built be conveyed to him but were mistaken about the boundaries or legal description, this would be a correctable mistake of fact.” *Foust v. Lujan*, 942 F.2d at 715; see *Ramona Lawson*, 159 IBLA 184, 190 (2003), and cases cited.⁹

⁹ In *Mary D. Hancock*, 150 IBLA at 352 n.7, the Board rejected BLM’s argument that the mistake to be corrected must be a mutual mistake of both the patentee and the Government, stating that “[w]e find no such requirement in the governing statute or regulation.” *Mantle Ranch Corp.*, 47 IBLA 17, 87 I.D. 143 (1980), was cited as an example of a unilateral mistake that supported correction of the patent. In fact, *Mantle Ranch Corp.* was not an example of a unilateral mistake of fact, but one in which the patent did not describe the lands that Mantle had intended to and actually did enter, cultivate, and construct his home and improvements on, and did not describe the lands the Government intended to convey to him by virtue of those efforts.

In *Ramona Lawson*, 159 IBLA at 190, the Board referred to BLM’s “discretionary authority to correct patents of public lands to eliminate mutual mistakes of fact,” citing *Hancock*, but did not acknowledge or explain *Hancock*’s footnote to the contrary.

The Board next referred to a unilateral mistake in patent correction cases in *Gordman Leverich L.L.P.*, 177 IBLA 52, 62 n.12 (2009), merely repeating the *Hancock* footnote without analysis. That reference was purely dictum, because the entrymen in that case had provided, and the Government had issued patents based upon, land descriptions that reflected square-shaped parcels of land believed to embrace the patentees’ improvements, and were derived, at least in part, from a fictitious survey. A later dependent resurvey that relied on the recovered corners of the fictitious survey resulted in sections shaped like parallelograms, which altered the patents issued in reliance on the original survey. BLM admitted that the resurvey added land the patentees had not intended to enter, and likely excluded land that one of the patentees had intended to, and did, enter, so that the error was a mutual mistake on the part of the patentees and the Government. 177 IBLA at 59, 61 n.10.

In cases involving physical entry and the investment of one’s labor and resources to establish the homestead by which title to the land is earned, the requisite mistake is properly framed as one of mutual mistake, *i.e.*, the issue is whether the patent includes the land the patentee intended to enter and earn, and the United States intended to convey, and/or excludes the land the patentee intended to enter and earn, and the United States intended to convey. *Ramona Lawson*, 159 IBLA at

(continued...)

The *error* that is subject to correction is defined by regulation to encompass “the inclusion of erroneous descriptions” and “the omission of requisite descriptions” in the patent at issue “as a result of factual error.” 43 C.F.R. § 1865.0-5(b). Such errors generally arise either (1) “where the patent does not match the description in the application or entry” because of “typographic or transcription errors appearing on [the] patent”; or (2) “where the patent describes the land as described in the application or entry, but the description does not match the land entered or intended to be entered on the ground,” in either case mistakenly including or excluding land. *Elmer L. Lowe*, 80 IBLA 101, 105 (1984). Errors in patent are limited to mistakes of fact and do not include mistakes of law. Such a showing of error is the legal prerequisite to patent correction: “Before [BLM’s] discretion can be exercised it must clearly appear that an error was, in fact, made. Otherwise, an application to [correct] would be barred as a matter of law.” *Ben R. Williams*, 57 IBLA at 12.

[2] Second, if an error is shown, the applicant then must demonstrate that considerations of equity and justice favor correction. *Gordman Leverich L.L.P.*, 177 IBLA at 60; *Mary D. Hancock*, 150 IBLA at 351; *Frank L. Lewis*, 127 IBLA 307, 309-10 (1993); *George Val Snow (On Judicial Remand)*, 79 IBLA 261, 262 (1984); *Ben R. Williams*, 57 IBLA at 13. When an error is shown, the Department will correct a patent, provided the concerned Federal administrative agency does not object, the Government’s interests are not unduly prejudiced, no third party rights are adversely affected, and substantial equities of the applicant will thereby be preserved. 43 U.S.C. § 1746 (2006).¹⁰

The ultimate burden of justifying the exercise of BLM’s discretionary authority to correct a patent for a mistake of fact falls on the party seeking the correction, who must demonstrate, first and foremost, that an error clearly was made. *Gordman Leverich L.L.P.*, 177 IBLA at 60; *Ramona Lawson*, 159 IBLA at 190; *George Val Snow (On Judicial Remand)*, 79 IBLA at 264.

⁹ (...continued)

190. The dictum in *Mary D. Hancock* and *Gordman Leverich L.L.P.* furnishes no sound basis or reason to abandon that analytical context, and we eschew it on that ground.

¹⁰ Section 316 of FLPMA was amended by section 411(e) of the Act of Feb. 20, 2003, Pub. L. No. 108-7, 117 Stat. 291, to require the concerned Federal administrative agency’s consent and approval of any patent corrections that affect the boundaries of, or jurisdiction over, land it administers. The record suggests that the Forest Service is not willing to consent to the requested correction. See Aug. 15, 2008, e-mail message from S. Hansen, Chief Cadastral Surveyor for Arizona, BLM, to V. Titus, Arizona State Office, BLM (“[t]he USFS would like to start the process to remove any improvements from public lands,” and deems the matter “a priority”).

We begin by summarizing the Routsons' case for a patent error as follows: Chiantaretto began cultivating Tracts A and B in 1913 and maintained that cultivation until 1924; by that cultivation he earned the right to have those tracts conveyed to him; the cultivation of Tracts A and B therefore demonstrates that Chiantaretto intended to earn more or different land than what he described in his applications; since he did not describe the two tracts in his applications or submit a third application and he could have applied for 160 acres, it must be because he made a mistake in the description, which he could not have avoided in any case because the original survey probably was fraudulent; thus, he never questioned his patent because he was unaware of his error; appellants therefore are entitled to have Chiantaretto's patent "corrected" to add Tracts A and B to the 40 acres they purchased from the entryman's successor in interest. We will examine this chain of inferences in light of the evidence of record.

As stated, Chiantaretto submitted a homestead entry application (Serial No. 022216) for 120 acres on April 21, 1913, and an additional homestead entry application (Serial No. 025689) for 20 acres on September 3, 1914, seeking a total of 140 acres of surveyed land located within the Prescott National Forest. In his "Final Proof, Testimony of Claimant" (Final Proof), he asserted that he, with his wife, had established actual residence on the lands on April 20, 1913, erected a house on May 25, 1913, and resided there continuously since then, with the exception of brief absences. He described the land sought, by legal subdivisions, exactly as he had in his two applications, noting that it was "[m]ostly flat mesa land, about half sandy loam and half adobe," with a total of from 35 to 60 acres planted and/or harvested for corn and potatoes each of the years from 1913 through 1916, and averring, in a handwritten statement, that he presently had "60 acres under cultivation in south part of homestead."¹¹ Final Proof at 2. He did not specifically describe where on the land the cultivated acreage was located. He also reported that he had improvements consisting of a 22 by 22-foot frame house, a 27-foot deep cement-lined well, a barn and other outhouses, and "145 acres 3 wire fence." *Id.*

Two witnesses (Tony Caratti and John Mensone), who had known the entryman for about 10 years and had been familiar with the land for about 3 years, executed identical statements (Final Proof, Testimony of Witness) before the U.S. Commissioner on June 23, 1916, attesting to the facts asserted in the entryman's statement based on their personal knowledge of his activities. Neither witness provided any information regarding the location of the improvements or the cultivated acreage on the homestead. By letter dated June 2, 1916, the Forest Service elected not to protest the entry, describing the same lands that Chiantaretto had described in his applications. The handwritten descriptions on the reverse side of

¹¹ As initially written, the statement was "60 acres under cultivation in south half of homestead." The word "half" was crossed out and "part" was inserted in its stead.

the Notice of Intention to Make Final Proof dated May 1, 1916, match the land description the entryman provided and the land description the Forest Service acknowledged in agreeing not to protest the entry. Following payment of the purchase price, a Homestead Certificate for 140 acres was issued by the Register on June 29, 1916, which was followed by issuance of the patent on November 9, 1916. The lands described in the 1916 patent are exactly the lands described in the homestead entry applications: the patent does not include any lands not described in the applications, and it does not exclude any lands that were described in the application.

Although they acknowledge that the 1871 Foreman survey is “the survey that the entryman depended on,” as the predicate for their assertion that Chiantaretto was unable to correctly describe the lands he intended to enter by reference to the public land survey, they argue Foreman’s survey “existed only as a map on paper and not as monuments on the land.” NA at 1.¹² They offer what appears to be a quote from Blout’s field notes that “[i]n the preliminary retracement no original sec. or quarter-section corners could be found in the entire township.”¹³ *Id.* However, an application for correction of a patent presumes that the lands at issue were correctly surveyed and/or resurveyed, but because of a mistake of fact regarding the

¹² Although the Routsons argue that Foreman’s original survey was fraudulent, NA at 4, the 1871 survey was incorporated into the 1916 patent and, accordingly, it is immune from challenge, regardless of whether it contains any error:

[O]nce patent has issued, the rights of patentees are fixed and the government has no power to interfere with these rights, as by a corrective resurvey. . . . [T]he government is bound by the last official survey accepted prior to its divestment of title. . . . It is well settled that the notes, lines and descriptions in an accepted survey are considered a part of the Patent. [Emphasis added.]

United States v. Reimann, 504 F.2d 135, 138-40 (10th Cir. 1974); *see, e.g., Alice Alleson*, 77 IBLA 106, 108 (1983).

Blout carried out his survey in a manner that protected Chiantaretto’s rights in the lands patented to him by restoring the corners in accordance with Foreman’s field notes and survey procedure. Under both surveys, Chiantaretto received the 140 acres described in his applications and in the patent. The issue in this appeal therefore is not derived from any perceived failure to protect the patentee’s bona fide right to the 140 acres conveyed to him or from any subsequent revisions in survey nomenclature or procedure. As will become apparent, the case presented to us is one built entirely upon supposition and conjecture about the entryman’s intentions in 1913.

¹³ The parties did not provide a complete copy of either Foreman’s or Blout’s field notes, and those records are not presently available at BLM’s website. The Routsons did not submit an excerpt containing this statement.

description contained in the patent document, such lands were either not included in the patent or excluded from the patent. In any event, the excerpt of Blout's field notes submitted to the Board shows that he first resurveyed the exterior boundaries of the township, which provided the basis for his resurvey of the subdivisional lines. Blout's 1924 Field Notes, Book 3740 at 4.

As evidence that Foreman's survey may have been fictitious, in order to provide the vehicle for establishing an error on Chiantaretto's part, appellants state that Foreman incorrectly depicted Humphrey's Wash as entering the township in sec. 19. In contrast, Blout's notes state that the township is drained by several large sand washes that enter the township from the south and by Humphrey's Wash (now known as Williamson Valley Wash), which enters the township on the west boundary of sec. 6. NA at 1, citing Blout's 1924 Field Notes, Book 3740 at 217, paragraph 2.¹⁴ They state that the west quarter-section corner of sec. 6 actually falls in Humphrey's Wash, again citing Blout's field notes, in which he stated that monumentation of the position was not practicable because of flooding in the wash. Blout's plat confirms this and records a witness corner to the position of the quarter-section corner. Citing the field notes for T. 15 N., Rs. 2 and 3 W., and T. 16 N., Rs. 1-4 W., which are also not in the record, the Routsons note that Foreman failed to mention that the corner was in the wash. NA at 1-2. From this circumstance, they conclude that if Foreman had actually surveyed the township, "he would have noted the corner falling in the wash and would have witnessed the corner with an offset. In addition, his map would have been correct and at least some of his monuments would have survived." NA at 2. The Routsons maintain that the "lack of a complete survey" was "common knowledge" in the GLO, which was why a resurvey was needed. NA at 2.

We cannot agree with the inferences appellants draw from these circumstances. Nothing in the record before us clearly establishes that Foreman did not actually survey the exterior boundaries of the township and run the section lines and set monuments at section and quarter-section corners. Foreman's failure to note that the west quarter-section corner of sec. 6 actually falls in Humphrey's Wash may constitute an error or defect in the execution of his survey, but it does not demonstrate that the survey was fictitious or fraudulent. Appellants' comment on the depiction of Humphrey's Wash on Foreman's plat is similarly unavailing. As shown on Foreman's plat, Humphrey's Wash flows in roughly a "U" shape in the north half of the township, with some fairly significant branches on the west side of the township that extend into the southwest quadrant. Contrary to the Routsons' arguments, the west terminus of the "U" is indeed the west boundary of sec. 6, T. 16 N., R. 4 W. Horse Wash is shown as one of the larger southern branches of Humphrey's Wash, and Horse Wash and its branches do enter the township through sec. 19, just as Foreman's plat depicted them. Nor does the fact that a dependent

¹⁴ This page from Blout's field notes is not in the record.

resurvey was undertaken confirm appellants' assertion that the patent contains a correctable error in the patent's land description: resurveys are performed to assess, restore, and maintain the conditions of the original surveys in harmony with the original records thereof. Notably, nothing in the record or provided on appeal suggests that Blout concluded or suspected that Foreman's survey was fraudulent or fictitious when he dependently resurveyed the subdivisional lines of the township, *see* n. 12, and, as appellants acknowledge, Blout's dependent resurvey "did accurately mark the earned tract on his map." NA at 3.

The Routsons next suggest that Chiantaretto was unable to describe the land he sought, alleging that Blout destroyed the "only survey marker that was available to the entryman for description of his homestead." NA at 2. They apparently mean to suggest that without this corner, the entryman was unable to describe the lands he intended to enter, which would have included Tracts A and B. Appellants conclude that "[w]ith Foreman's survey missing, probably fraudulent, and Blout destroying the only corner available to the entryman, the fences and culture of the entry were the only means to define the entry." (Original emphasis deleted.)¹⁵ The Routsons quote in part 43 U.S.C. § 770 (2006), which confers discretion on the Secretary to authorize, by regulation, departures from the system of rectangular surveys "whenever it is not feasible or economical to extend the rectangular surveys in the regular manner or whenever such departure would promote the beneficial use of lands," presumably to address the irregular shape of the tracts they seek. NA at 2.

Blout's plat, like Foreman's plat, reflected the rectangular public land survey system, and therefore 43 U.S.C. § 770 (2006) is by its terms inapplicable. The tracts appellants seek are not bounded by the north-south or east-west lines depicted in the 1871 and 1924 survey plats. Tract A is highly irregular in shape, consisting of arcs and several angles, and it basically surrounds the northern boundaries of Chiantaretto's entries as he described them in his applications and as described in the patent to embrace the Routsons' irrigation system. Tract B is a triangle-shaped tract, the hypotenuse of which coincides with the southern boundary of the original entries as Chiantaretto described them, to embrace that portion of their irrigation system. That the two tracts are so shaped strongly argues against an error in the description of the lands claimed, because Chiantaretto was required to describe the claimed lands in a manner that conformed to the public land survey system, and he did so. *See* 43 U.S.C. § 161 (1970); 43 C.F.R. §§ 101.6, 166.1, 166.3, and 170.8 (1940).

There is no evidence that the entryman intended to, and did, enter either of the two tracts of land now sought by the Routsons when he submitted his final proof

¹⁵ The problem with this argument is that if the corner survey marker was in its original position until 1924 when Blout purportedly destroyed it, then it was available to Chiantaretto when he described the lands he sought to homestead.

in 1916, or that he even actually cultivated the two tracts. To the contrary, Chiantaretto and his witnesses averred only that his cultivation was in the “south part” of the land he claimed, which, on the face of it, would seem to exclude Tract A. To the extent that the better land in the township was associated with sandy washes, Blout’s plat shows Chiantaretto’s homestead generally embraced such a wash in a stair-step fashion. More fundamentally, a review of the surveyors’ field notes appears to dispense with the suggestions that Tracts A and B are lands Chiantaretto intended to, and did, enter and cultivate to earn his homestead patent, or that the cultivated field depicted on Blout’s plat confirms his cultivation and intentions in 1913.

Foreman’s field notes state that heading north on the line between secs. 27 and 28, at 40 chains he set the quarter-section corner. At 70 chains he entered a cornfield bearing northeast and southwest. After setting the corner common to secs. 21, 22, 27, and 28, he then headed east on the line between secs. 22 and 27 (*i.e.*, along the southern boundary of the Chiantaretto homestead). At 20 chains, the point of the quarter-quarter-section corner that establishes the westernmost boundary line of the Chiantaretto patent, Foreman *left* the cornfield. Continuing east, at 58 chains he *entered another* cornfield bearing north and south. He did not indicate the size of the cornfield or whether he had drawn it to scale on his plat. Foreman Field Notes, Book 1049 at 25-26.

By comparison, Blout, on his plat, depicted a cultivated area apparently overlying the quarter-quarter-section corner at 20 chains on the line between secs. 22 and 27, but bearing northwest and southeast, the *opposite* bearing of the field Foreman recorded. He provided no information regarding the size of the cornfield or indication it is drawn to scale. Of far greater importance is the fact that he did not record any calls to this cultivated area or to any cornfield in the vicinity of the corner common to secs. 21, 22, 27, and 28 or Tract A and/or B. He moved east to set the quarter-section corner on the line between secs. 22 and 27 at 39.91 chains. Continuing eastward, at 47.83 chains he encountered a wire fence bearing northeast and southwest and entered a “level cultivated field” also bearing northeast and southwest, apparently within the described lands of the homestead. Blout crossed a dry sand wash at 50.54 chains. He arrived at a second wire fence bearing northwest and southeast at 53.34 chains and there entered a cornfield, also apparently within the boundaries of the homestead and, like the second fence, bearing northwest and southeast. He left the northwest-southeast bearing wire fence and “cultivated land” at 59.14 chains. Blout Field Notes, Book 3740 at 49.

Thus, the cornfield purportedly embraced by Tracts A and B noted by Foreman in 1871 was on National Forest lands, was aligned on a northeast-southwest bearing, and was outside the boundaries of what would later become the patented entry. The cultivated area drawn on Blout’s plat in 1924 lies on the opposite bearing, to the

northwest and southeast, and apart from the sketch shown on his plat, is not documented or otherwise supported in his field note record.

As shown by their field notes, both surveyors recorded the existence of cultivation near the approximate center of the middle block of the patented lands, at the quarter-quarter-section corner along the line between secs. 22 and 27. They placed that area of cultivation in the south part of the homestead, and inside its southern boundary, but aligned differently: Foreman recorded calls to one north-south bearing cornfield, and Blout recorded calls to two fenced, cultivated fields, one lying in a northeast-southwest direction, the other bearing northwest-southeast. Manifestly, even without the necessary field note record to establish position and bearing, the cultivated field depicted on Blout's plat is not the same cultivated field shown on Foreman's plat that appellants now seek as Tracts A and B.

What is certain is that the patented lands included Chiantaretto's house, well, barn and outbuildings, and lands he had had under cultivation during the life of the entry. *Compare with Ramona Lawson*, 159 IBLA at 191-97; *Mary D. Hancock*, 150 IBLA at 348-49, 352 (“[A]n entryman would not complete his legally-required improvements on lands and then apply for other lands”); *Mantle Ranch Corp.*, 47 IBLA at 19-20, 32-34, 87 I.D. at 144, 151-52. He could have applied for additional acreage under the homestead laws and did not, and neither he nor his heirs ever challenged or questioned the correctness of the description of his patented lands.

Appellants nonetheless contend Blout destroyed the only survey marker that would have been available when Chiantaretto marked the boundaries of his entry to support the claimed error in the land description. They seemingly assume that the survey marker monuments a true corner of the original 1871 survey, but fail to relate that survey marker to the record of the Foreman survey. Appellants do not establish the date it might have been placed, by whom, or for what purpose, and do not show or suggest why it was error to destroy it, if indeed it was discovered and destroyed by Blout. Without that information, there is no foundation whatever for any assertions purporting to confirm an error in the land description or that Chiantaretto intended to include Tracts A and B in that description in 1913.

Presumably referring to the fence that surrounds Tracts A and B as shown on Hopps' private survey plat, we are asked to conclude that “the fence and culture of the entry were the only means to define the entry,” and that those same fence lines still stand today, more than 90 years later. NA at 2. The survey record before us discloses only the fences recorded by Blout in 1924, and the locations and bearings of those fences and the cultivated fields with which they are associated are not consistent with the argument asserted by appellants or the position of the fence surrounding the two tracts. In any event, it is well established that it must be shown

that fences were intended to define the lines of a public-land survey in order to justify accepting them as such. See *William D. Brown*, 137 IBLA 27, 31 (1996); *James O. Steambarge*, 116 IBLA 185, 192-93 (1990); *Crow Indian Agency*, 78 IBLA 7, 11 (1983); *Alfred Steinhauer*, 1 IBLA 167, 171-72 (1970). Here, the record is devoid of any evidence that the fences were erected in reliance on evidence of the original survey, and that they thus reflect the lines of the survey. *Tracy V. Rylee*, 174 IBLA 239, 250-51 (2008) (citing *Longview Fibre Co.*, 135 IBLA 170, 183-84 (1996)).

In response to that part of BLM's decision observing that appellants' situation is a result of their failure to survey the land they purchased, the Routsons state that surveyors with the SCS in 1964 prepared a soil and capability map and conservation plan map in 1985 for Chiantaretto's son "showing the lands earned, just as Blout's map did." NA at 3. Nothing submitted on appeal indicates that SCS surveyed any of the lines of sec. 22 in connection with their activities. Moreover, neither map depicts any survey lines, and while those maps do indeed show cultivation outside the patented land, and may even depict the cultivated areas shown on Foreman's and Blout's official plats, we do not agree that they illustrate or confirm that Chiantaretto or the United States erred in describing the land sought for homestead entry in 1913 and patented in 1916. The maps show only that irrigation improvements were installed on Forest Service lands outside the patent, and outside the $W\frac{1}{2}SW\frac{1}{4}SE\frac{1}{4}$ and $S\frac{1}{2}SE\frac{1}{4}SW\frac{1}{4}$ sec. 22 that the Routsons purchased.

[3] The evidence may be summed up as follows. In 1871, Foreman recorded a cornfield aligned on a northeast-southwest bearing, in the vicinity of Tract B and perhaps in the vicinity of Tract A, but outside the $S\frac{1}{2}SE\frac{1}{4}SW\frac{1}{4}$ sec. 22 later described by and patented to Chiantaretto. Further east on the section line between secs. 22 and 27, at 58 chains, Foreman also recorded a north-south bearing cornfield. Chiantaretto arrived on the land in 1913 and described the lands he intended to enter and homestead. The Forest Service formally acquiesced in the entry to the extent of lands described exactly as Chiantaretto had described them in his applications and exactly as was ultimately described in the patent. That patent embraced Chiantaretto's home, other improvements, and cultivation in the south part of the homestead, as he described them in his Final Proof, and as attested to by his witnesses. There are no objective facts of record establishing that Chiantaretto actually cultivated Forest Service lands identified as Tracts A and B prior to issuance of patent in 1916.

When Blout performed his dependent resurvey in 1924, he did not depict any cultivated area that otherwise could be deemed Tract A or record any calls to any such field. He also did not record any calls to any cornfield in the vicinity of Tract B. However, moving east along the section line between secs. 22 and 27, at 47.83 chains and also at 53.34 chains he did record calls to two fenced, cultivated fields, one bearing northwest-southeast, the other bearing northeast-southwest. There are

no objective facts in the record from which we can conclude that the evidence of cultivation Blout observed in 1924 reflected the location and extent of cultivation as it might have existed in 1913 or in 1916, or that such evidence demonstrates an intention on Chiantaretto's part to enter and homestead lands different from those he described and to which he received patent. Chiantaretto could have applied for additional acreage but did not. Neither he nor his heirs ever challenged the description contained in the applications and patent.

Appellants purchased 40 acres from Chiantaretto's son, described as the $W\frac{1}{2}SW\frac{1}{4}SE\frac{1}{4}$ and $S\frac{1}{2}SE\frac{1}{4}SW\frac{1}{4}$ sec. 22, GSRM, and now seek to "correct" his father's patent to add 18.41 acres to their deeded acreage. The irregular shape of Tracts A and B is not consistent with the rectangular public land survey system or with the land descriptions Chiantaretto furnished and to which the Forest Service acceded. Appellants' arguments regarding perceived deficiencies in the survey record are not persuasive and do not support their conclusion that the original survey was fictitious or fraudulent, even assuming *arguendo* they properly can attack it. There is no evidence that the fence (or fences) shown on appellants' private survey plat as enclosing their irrigation system in Tracts A and B coincides with or is in any way tied to the lines of the original survey or was intended to mark the boundaries of the land Chiantaretto actually described. The placement of the fence (or fences) shown on the private plat is not consistent with Foreman's record of the location and bearing of the cornfield that it supposedly defines or with Blout's description of the fences he encountered well east of the cultivation in the vicinity of Tract A or B. Taken together, these circumstances do not even hint at a correctable mutual mistake of fact.

Even assuming *arguendo* that Chiantaretto did indeed cultivate Forest Service lands outside the boundaries of his entry and patent, however, such cultivation does not *ipso facto* establish that he intended to enter and earn any such lands so as to impute a mutual error in describing the lands ultimately patented to him. To the contrary, if in fact he did encroach on Forest Service lands, the record as a whole, when not enlarged by unwarranted inferences, shows only that he trespassed. That he might have initiated or maintained a trespass in 1913 does not demonstrate, 97 years later, that the patent contains a mutual mistake of fact that must be corrected pursuant to FLPMA. In these circumstances, BLM properly denied the application to correct patent.¹⁶

¹⁶ The Routsons seem to assume that adding Tracts A and B to the lands patented to their remote predecessor in interest would have the effect of resolving their trespass by giving them title to the lands at issue. That is not so. Correcting the patent would not transform their bargain into a purchase and conveyance of 58.41 acres. Absent a conveyance to the Routsons from the person who now owns the land once patented
(continued...)

Accordingly, 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, and the Routsons' petition for a stay is denied as moot.

_____/s/_____
T. Britt Price
Administrative Judge

I concur:

_____/s/_____
H. Barry Holt
Chief Administrative Judge

¹⁶ (...continued)
to Joseph Chiantaretto, appellants would still have only the same 40 acres they purchased, described in their deed as W $\frac{1}{2}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$ and S $\frac{1}{2}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$ sec. 22, T. 16 N., R. 4 W., GSRM.

ADMINISTRATIVE JUDGE JACKSON DISSENTING:

I must respectfully dissent because I find the decision on appeal is neither supported in fact or law. The majority finds a resurvey executed in 1924 was a “dependent” resurvey, applies Board precedent for dependent resurveys, assumes that resurvey “restored” section lines and corners where they were established on original survey in 1871, and then concludes the Routsons failed to show that the original entryman erred in his legal description for the lands he earned when patent issued in 1916, as later depicted on the 1924 Plat of Resurvey. I disagree.

Facts of Record

The Government Land Office (GLO) conducted an original boundary and subdivision survey in 1871 of T. 16 N., R. 4W., Gila and Salt River Meridian (Township 16). It was performed by S.W. Foreman, Deputy Surveyor, who monumented boundary, section, and quarter corners with wooden posts set in dirt mounds. His field notes and Plat of Survey identify and depict several irregularly shaped cultivated fields in the township, including a cornfield astride secs. 22 and 27 and a cultivated field at the corner of secs. 21, 22, 27, and 28.

Joseph Chiantaretto (Chiantaretto) was approved entry to 120 described acres in the Prescott National Forest administered by the Forest Service, U.S. Department of Agriculture, after the Secretary of Agriculture determined they were “chiefly valuable for agricultural purposes” on application by another putative settler (W.G. Parkinson) and requested that they be open “to entry in accordance with the provisions of the homestead laws.” Secretarial corresp. dated Nov. 11, 1912; *see* Act of June 11, 1906, 34 Stat. 233 (1906); *Mary D. Hancock (Hancock)*, 150 IBLA 347, 350-51 (1999). He later made a similar determination on application by Chiantaretto and requested that an additional 20 adjacent acres in sec. 22, Township 16 also be open to entry. Secretarial corresp. dated Dec. 20, 1913. Chiantaretto applied for “amended entry” to those lands, but his application was rejected by GLO. With the assistance of counsel, F.L. Haworth, Esq., Chiantaretto’s “additional entry” to those 20 acres was allowed on September 15, 1914. GLO later examined and determined his entries were “OK” on January 20, 1915.

Final proof of claim for patent was made on June 23, 1916. Chiantaretto and two supporting witnesses testified that he established residence in the spring of 1913 and erected certain improvements on his homestead (*i.e.*, a house, barn, outbuildings, well, and fencing that enclosed 145 acres). Testimony of Tony Caratti at 2, Testimony of John Mensone at 2, Testimony of Joseph Chiantaretto at 2. They testified “about half” of Chiantaretto’s 140-acre homestead has “good soil” (sandy loam) and that 60 acres “in south part of Homestead” were planted with corn and potatoes in 1916 (*i.e.*, nearly half of his approved entry), having had a “fair” crop in 1913 (35 acres), a “good” crop in

1914 (50 acres), and another “fair” crop in 1915 (60 acres). *Id.*¹ After Chiantaretto’s Homestead Certificate was approved, President Wilson issued him Patent No. 553625 on November 9, 1916.

Sidney E. Blout, U.S. Cadastral Engineer, was directed to perform a resurvey of the boundaries and subdivisions of Township 16 by special instructions dated February 11, 1924.² Field Notes at 1. Finding no evidence of Foreman’s 1871 survey on retracement of the township boundaries (*e.g.*, wooden posts), he used the Township 17 boundary corners that were established on resurvey in 1902 to resurvey the Township 16 boundaries and establish closing corners on that boundary at proportionate distance, as directed by the *Manual of Surveying Instructions for the Survey of the Public Lands of the United States* issued on January 1, 1902 (1902 Manual of Survey), §§ 254-56 at 80. Since he was unable to locate any original corners within the township, Blout established corrected section lines with new section and quarter corners at proportionate distance, also as required by the 1902 manual. 1902 Manual of Survey, §§ 262-64 at 82; *see* Field Notes at 40, 42, 43, 48, 49, 50.

In going west along his corrected section line between Chiantaretto’s patented lands in sec. 22 and Forest Service lands in sec. 27, Blout passed through rolling, sandy land with scattered timber and underbrush to ascend a ridge at 32.40 chains, on which was a frame house roughly 50 yards (225 links) to the north at 32.75 chains, continuing to wire fencing and a cornfield (bearing NE/SW) at 47.83 chains, a dry sand wash, and a wire fence marking the end of that cornfield (bearing NW/SE) at 59.14 chains. Field Notes at 49. Blout characterized bottom land soils along sand washes in certain sections of Township 16 as dark, sandy loam, which “can nearly all be classed as 1st rate and will produce good crops without the aid of irrigation,” including secs. 22 and 27 where the Chiantaretto homestead was located; he characterized the remainder of the township as “unfit for agricultural purposes.” *Id.* at 73. Blout’s Plat of Resurvey depicts his corrected section lines and shows roughly half of Chiantaretto’s cornfield was within the legal description of his patent and that the remainder extended onto adjacent Forest Service lands in secs. 22 and 27.

¹ Consistent with the Secretary of Agriculture’s determination and request that these lands be open to entry, the Forest Service stated it would “enter no protest against the issuance of patent on homestead entry [by Chiantaretto] within the Prescott National Forest.” Forest Service corresp. dated June 2, 1916.

² Although the Routsons request for patent correction claimed Chiantaretto’s error was due to survey and resurvey errors, BLM submitted only extracts from Blout’s Field Notes (Field Notes) and his Plat of Resurvey for our review in this appeal.

Appellants acquired a 40-acre portion of the Chiantaretto homestead in 1982 from Chiantaretto's son, Harry Joseph Chiantaretto (*i.e.*, S $\frac{1}{2}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$, W $\frac{1}{2}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$, sec. 22), which they then understood had been cultivated and fenced by the Chiantarettos since 1913. SOR at 2. The Soil Conservation Service (SCS), a component of USDA, prepared an irrigation design and map for the Routsons in June 1985,³ which they implemented at an estimated cost of \$50,000 to install thousands of feet of pipe and sprinkler line (plus hydrants, risers, and sprinklers). SOR at 3.⁴ After a Forest Service survey again showed cultivation in the Prescott National Forest, it initiated a trespass action against the Routsons and later directed them to remove their irrigation system by December 31, 2007.

During the pendency of the Forest Service removal directive, the Routsons caused their farm to be surveyed, which identified 15.91 acres in sec. 22 (Disputed Land A) and 2.50 acres in sec. 27 (Disputed Land B) that they aver were farmed and fenced by the Chiantarettos but not included in Chiantaretto's patent, as determined on resurvey and depicted on Blout's Plat of Resurvey. *See* Record of Survey filed Oct. 17, 2006. These identified lands include part of the cornfield extending from patented lands in the southwest corner of the Chiantaretto homestead onto adjacent Forest Service lands to the south and west in N $\frac{1}{2}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$, sec. 27 (Disputed Land B) and S $\frac{1}{2}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$, sec. 22 (a roughly 3-acre portion of Disputed Land A), plus other lands fenced and farmed by the Chiantarettos to the north and east of that cornfield in N $\frac{1}{2}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$, sec. 22 (the remaining 13 \pm acres of Disputed Land A). *See* Record of Survey; Plat of Resurvey.

The Routsons applied for a correction of Patent 55365 on November 21, 2006, to "include lands actually earned by the original entryman." Application at 1. As they then explained:

Blout's 1924 map and notes show the lands excluded from the patent. *The homesteader earned the lands excluded from the patent but was denied the right of their inclusion (by correct description) by both Foreman [on original survey in 1871] and Blout [on dependent resurvey in 1924].* The extent of the error is 18.41 acres, making the total homestead less than the allowed 160 acres. The lands have been improved and in use

³ SCS earlier prepared soil, capability, and conservation maps of these farmlands for the entryman's son, who later sold his farm to the Routsons.

⁴ The Routsons' estimate was based on material costs of more than \$28,000, plus their labor. *See* Application to Correct Patent (Application) at 4. Although they did not submit receipts to support their material costs, BLM does not contest the scope or magnitude of these improvements.

continuously since the original homesteader was granted the patent in 1916.

Id. at 2 (emphasis added). BLM rejected the Routsons' claims that the 1871 and 1924 surveys were inaccurate or improper because they had not presented "clear and convincing evidence that [Blout's] resurvey was fraudulent or grossly erroneous" and because their averment that Chiantaretto's fencing "accurately depicted the extent" of his patent did not demonstrate that bona fide rights were impaired on resurvey in 1924. Decision at 2, 3 (citing *Tracy V. Rylee*, 174 IBLA 239, 250-51 (2008)). Having determined that Blout's "dependent" resurvey reestablished original section lines and corners in their true and original locations, BLM then considered whether Chiantaretto erred in describing the lands he earned, as later depicted on Blout's Plat of Resurvey:

It has been held by the courts that the entryman has the responsibility to locate improvements within the subdivisions called for in the patent. The resurvey took place a mere seven years after the date of patent. [Chiantaretto] would have surely known that the survey had taken place. The monuments set in the 1924 survey should have been easily found. If [Chiantaretto] thought his patent was incorrect, then he had the opportunity to file for an amended entry under the existing laws. The inactions of [Chiantaretto] show that he did not disagree with the 1924 resurvey. . . .

If the original patentee was not certain of where their legally described lands were, he could have hired a local land surveyor at any time. The Routsons also had the right to hire a land surveyor prior to purchasing their lands in 1982. In an IBLA decision, *Mary D. Hancock, et al.*, 150 IBLA 347 (1999), the Court stated, "There is no apparent reason for this evident misdescription, other than failure to survey the property Any competent surveyor could have accurately described the tract in the 1920s."

Decision at 3. The Decision concludes by representing that BLM conducted a "detailed investigation" and then finding "there is no error with the survey or patent." *Id.* at 3-4. This appeal followed.

Discussion

Section 316 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1746 (2006), authorizes the Secretary to correct patents "where necessary to

eliminate errors,”⁵ which includes the circumstance where the land described in the patent “does not match the land entered or intended to be entered on the ground.” *Elmer L. Lowe*, 80 IBLA 101, 105 (1984); *accord Arthur Warren Jones*, 97 IBLA 253, 254 (1987); *Rosander Mining Co.*, 84 IBLA 60, 63 (1984); *George Val Snow (On Judicial Remand) (Snow)*, 79 IBLA 261, 262 (1984). By rule, a correctable error is “limited to mistakes of fact and not of law,” and corrective relief will be granted only if BLM determines that patent correction is “warranted and appropriate.” 43 C.F.R. §§ 1865.0-5(b), 1865.1-3.⁶

The Routsons aver that Blout’s field notes and resurvey plat identify their cornfield and “accurately mark the earned tract” and that fencing erected on entry by Chiantaretto “are the same fence lines in use today.” SOR at 2, 3. They contend “it is a misconstruction of the facts to say the fences do not describe the lands actually earned in this case” in arguing that this patent should be corrected to conform to what Chiantaretto earned in 1916. *Id.* BLM claims the Routsons “produced no evidence to show that [Chiantaretto] entered or intended to enter any land outside the land

⁵ The legislative history suggests that this provision was addressed in Recommendation 113 by the Public Land Law Review Commission (PLLRC), which had been created by Congress to comprehensively review the law governing Federal lands and determine “whether and to what extent revisions thereof are necessary.” 78 Stat. 982 (1964); *see* Legislative History of FLPMA, Pub. No. 95-99 (Committee Print, Apr. 1978) at 100, 1561, 1723 (the Committee bill “is in accordance with over one hundred recommendations of the [PLLRC] report”); *One Third of the Nation’s Land* (June 1970) (final report and recommendations of the PLLRC). Recommendation 113 would protect “those who honestly enter and hold possession of land in full belief that it is their own” by permitting the resolution of title disputes with the Federal government that arose out of “differing interpretations of factual data, differing opinions on the application of legal principles, or both.” *One Third of the Nation’s Land* at 261, 262. Although different, the mechanism selected by Congress to address these circumstances was clearly and obviously “in accordance” with Recommendation 113, as observed by the Committee and its Chairman, Senator “Scoop” Jackson. Legislative History of FLPMA at 100, 1561, 1723.

⁶ In making that determination, BLM must consider whether equity and justice favor patent correction. *See, e.g., Gordman Leverich L.L.P. (Leverich)*, 177 IBLA 52, 60 (2009); *Hancock*, 150 IBLA at 351; *Frank L. Lewis*, 127 IBLA 307, 309-10 (1993); *Snow*, 79 IBLA at 262. BLM determined no error was made by Chiantaretto but did not address whether equity and justice favored correcting his patent; nor does BLM do so in its Answer on appeal. Since equitable considerations are not here at issue, I do not believe they have any relevance in our deciding this appeal and whether BLM properly found no error was made by Chiantaretto when making final proofs in 1916.

described in the Patent,” as depicted on Blout’s 1924 plat, and that they failed to demonstrate that Chiantaretto’s patent “did not describe the land [he] entered or intended to enter.” Answer at 5, 7.

The Decision states that Blout executed a “dependent resurvey” and then applies Board precedent for dependent resurveys, a view shared and taken by the majority. Decision at 2-3; 179 IBLA at 189, 196 n.12, 198, 201; *see* Answer at 2-3, 5-6, 7. The record does not warrant our finding that Blout performed a “dependent” resurvey or applying precedent applicable to dependent resurveys under the facts of this case and, in my view, shows that a mutual mistake occurred when Blout established new section lines and corners that placed lands Chiantaretto earned under the homestead laws outside the four corners of his patent’s legal description. Nor does the Decision address whether the land described by Chiantaretto on entry and for patent “match the land entered or intended to be entered on the ground.” *See Elmer L. Lowe*, 80 IBLA at 105. Without any reference to the facts of record, the decision summarily states that cultivation by Chiantaretto does not “indicate an error in the original conveyance document” because BLM assumed he knew and presumably agreed after Blout’s resurvey that his cornfield and other cultivated lands were properly excluded from his 1916 patent. Decision at 3; *see* Answer at 6. BLM’s stated rationale is inconsistent with Board precedent interpreting section 316 of FLPMA, not supported by the facts of record, and contrary to logic and common sense. Moreover and in any event, I find BLM’s conclusion that no error was made by Chiantaretto to be contrary to the clear weight of the evidence presented. Each of these issues is discussed separately below.

I. *BLOUT DID NOT PERFORM A “DEPENDENT” RESURVEY, AND BLM’S RELIANCE ON IT AS IF IT WAS CONSTITUTES ERROR.*

Nothing in this record or the applicable survey manual shows or suggests that Blout performed a “dependent resurvey” of this township during 1924, a concept not embodied in survey manuals until 1930. Surveyors for GLO performed retracements and/or resurveys during the 1920s under the 1902 survey manual, which required them to retrace township boundaries, locate original corners, and determine whether those found corners are “defective” (*i.e.*, beyond acceptable limits). 1902 Manual of Survey § 251 at 79-80.⁷ If corners within limits are found, the retracement reestablishes those corners, but if they are defective or “have been obliterated, the deputy surveyor will resurvey so much of said boundaries as may be necessary,” in which case new corners are established at proportionate distance, old corners are destroyed, and interior lines of survey corrected with new section and quarter corners set at proportionate distance. *Id.* §§ 254, 272-74 at 80, 84. Blout followed this process, and because he could find no

⁷ These requirements were also part of earlier survey manuals. *See, e.g.*, 1894 Manual of Survey at 72-74; Surveyor General Circular, 27 L.D. 79 (June 15, 1898).

evidence for any of the original corners established in 1871, he established new boundary, closing, section, and quarter corners and corrected section lines, including those that bisected cultivated fields such as Chiantaretto's cornfield. See Plat of Resurvey; Field Notes at 48, 49, [177⁸].

Recognizing that retracements and resurveys of the public lands could result in new boundaries affecting the rights of those then occupying the land, see, e.g., *Kean v. Calumet Canal & Improvement Co.*, 190 U.S. 452, 461 (1903), Congress acted to protect their rights by requiring the Secretary to mark public land boundaries after a full investigation: "Provided, That no such resurvey or retracement shall be so executed as to impair the bona fide rights or claims of any claimant, entryman, or owner of lands affected by such resurvey or retracement." Act of March 3, 1909, 35 Stat. 845 (1909) (1909 Act), 43 U.S.C. § 772 (2006). Although the Secretary was directed to protect those rights by not impairing them, general instructions specifying what those rights are and how they should be protected were not issued until publication of a revised survey manual in 1930.

The Department did, however, issue regulations governing when it would exercise its discretionary authority to resurvey the public lands under the 1909 Act. Circular No. 520, 45 L.D. 603 (1917). To minimize the number and resulting cost of such resurveys, the rules specified that: Title to at least 50% of a township must remain in the United States; a majority of its settlers must join in requesting a resurvey; it must be shown either that there is extensive obliteration of original survey corners or that the original survey was "grossly defective." *Id.* at 604-05. If an "actual field examination" verifies such obliteration or defects and that an official resurvey is necessary, "the matter will then be laid before the Secretary of the Interior with a request for authority to proceed with the actual field work." *Id.* at 603. If authorized, the Department's custom was then "to cause all public lands in a township that is to be resurveyed to be withdrawn pending the resurvey, as a protection to those who may have an intention of initiating claims to the unappropriated lands." *Wiegert v. Northern Pacific Railway Co., (On Rehearing)*, 48 L.D. 48, 49 (1921); see 49 L.D. 413 (1923), as modified by 49 L.D. 597 (1923).

Blout's resurvey affected Chiantaretto's homestead under the 1909 Act by establishing new section and quarter corners and a corrected section line that bisected his cornfield and was executed pursuant to Circular 520 and the 1902 manual and before that manual was revised in 1930.

⁸ The Routsons quote from this cited page of the field notes as follows: "In the preliminary retracement no original sec. or quarter sections corner could be found in the entire township." SOR at 1. Although BLM did not provide this page in its resurvey extract, it concedes Blout "could not locate the original corners" on resurvey. Answer at 8.

The *Manual of Instructions for the Survey of the Public Lands of the United States* issued on June 14, 1930, revised and superceded the 1902 Manual of Survey to be in harmony “with recent legislation,” including the 1909 Act. 1930 Manual of Survey § 11 at 21; *see id.* § 9 at 15-20. The 1930 revision therefore discussed bona fide rights under the 1909 Act (*i.e.*, what they are and how they would be protected to avoid impairment). 1930 Manual of Survey, Chap. VI at 279-310. In addition, it established a new, official resurvey system⁹ following the Supreme Court decision in *Cox v. Hart*, 260 U.S. 427, 436 (1922), which opined that surveyed public lands are properly treated as unsurveyed “when the survey originally approved and platted is subsequently annulled or abandoned because the lines and marks established have become obliterated.” The Court then concluded:

With the disappearance of the physical evidences, the old survey survived only as an historical event. As a tangible, present fact it ceased to exist, and a new survey became necessary to re-establish the status of the area over which it had extended as surveyed lands of the United States.

260 U.S. at 438.¹⁰ Shortly thereafter and in a related vein, the Supreme Court held that when a patent issues based on an original survey and evidence of that survey remains, such evidence controls over a resurvey and, as to those patented lands, the Department’s resurvey is only “for its own information.” *United States v. State Inv. Co.*, 264 U.S. 206, 212 (1924).

⁹ Although newly official, it was not unprecedented as the Department’s evolving practice was to perform “dependent” resurveys where possible and “independent” resurveys when necessary (*e.g.*, complete obliteration of any evidence for original survey boundary and interior corners). *Compare* 1930 Manual of Survey, §§ 400, 401 at 284 *with J.M. Beard (on rehearing)*, 52 L.D. 451, 453-54 (1928) (original boundary corners were found, which allowed a “dependent” resurvey to be performed).

¹⁰ Factual similarities exist between this case and *Cox v. Hart*. There, as here, public lands were cultivated long after an official survey was performed and all evidence of that survey had disappeared. The issue was whether those public lands should be treated as surveyed or unsurveyed in law and fact when they were cultivated and before a resurvey was performed; the Supreme Court held they were “unsurveyed” and must be resurveyed to reestablish their status as “surveyed lands of the United States.” 260 U.S. at 438. Also at issue was whether land must be cultivated in order to be possessed, an issue not dissimilar from determining whether an entryman entered or intended to enter under the homestead laws. The Supreme Court held that neither “an inclosure or any physical or visible occupancy of every part of the land” is necessary for a farmer to be in actual possession of the public lands. 260 U.S. at 433.

The 1930 manual limited bona fide rights to those arising out of good faith location to the exclusion of good faith occupation “clearly in disagreement” with original corners found on resurvey. 1930 Manual of Survey §§ 396-97 at 283. It also established distinctions for resurveys, identifying and distinguishing between types of resurveys consistent with both *Cox v. Hart* and *United States v. State Inv. Co.*, *supra.* The 1930 manual therefore identifies resurveys as either dependent or independent, with a dependent resurvey being executed in “those cases showing fairly concordant relation between conditions on the ground and the record of the original survey” and an independent resurvey performed “where the original survey can not be identified with any degree of certainty” or where a dependent resurvey would be “inadequate or lead to unsatisfactory results.” 1930 Manual of Survey §§ 400, 401 at 284. To “duly protect all private rights which have been acquired upon the basis of the original approved survey and plat,” an independent resurvey “supersedes the record of the original survey,” or in the parlance of the Supreme Court, the original survey is annulled or abandoned by an independent resurvey. *Id.* § 401 at 284.

Both dependent and independent resurveys protect bona fide rights under the 1930 manual but do so very differently. A dependent resurvey protects those rights through the flexible application of inflexible rules under the 1902 Manual of Survey, whereas an independent resurvey segregates lands which have either been entered or patented based on an earlier survey plat, identifying them by tract using metes and bounds. 1930 Manual of Survey §§ 402, 414, 434-35 at 284-85, 289, 300-01; *see id.*, §§ 415, 417, 426, 428, 435-48 at 289-90, 293, 298-99, 301-06. Since the choice between a dependent and independent resurvey depends, *inter alia*, on the “extent of obliteration” and the “extent of disposals by the Government,” questions that cannot be answered until after a comprehensive field examination, the manual recognizes that “a preliminary field examination will be required and authorized before the resurvey is to be undertaken.” *Id.* §§ 403-04 at 285. Upon receipt and review of the field examiners report, the GLO supervising officer then determines the type of resurvey to be performed in special instructions. *Id.* §§ 405-07 at 285-86.

This “new” process under the 1930 manual was consistent with and undoubtedly replaced field examinations for verifying the extent of obliteration under Circular 520. Due to the complete obliteration of all evidence of the original 1871 survey, the criteria for performing resurveys under Circular 520, and consistent with *Cox v. Hart*, *supra*, it is logical to infer that Blout’s special instructions required “the usual tract segregations for valid or patented entries in this area, which cannot be conformed to the lines of resurvey.” *See United States v. Reimann*, 504 F.2d 135, 137 (10th Cir. 1974) (quoting special instructions for a 1924 resurvey). I am unable to confirm the accuracy of this inference because, for whatever reason, BLM elected not to provide those special instructions to the Board, notwithstanding its representation that it conducted a “detailed investigation” of the Routsons claimed resurvey errors. Decision at 3.

Blout complied with the 1902 Survey Manual by establishing new section lines and corners throughout the township due to the complete absence of any original evidence on the ground. I find GLO erred in approving that resurvey and accepting his boundaries as properly marked absent any evidence that bona fide rights were considered under the 1909 Act. Rather than find all resurveys affecting the good faith rights of entrymen and other claimants between 1909 and 1930 improper *per se*, I believe the better practice in logic and law is to give greater or lesser weight to those resurveys based on the extent of obliteration, with no weight given where original survey evidence is wholly absent.¹¹ Thus, if it is determined on resurvey that the original survey was grossly inaccurate or erroneous or if all evidence of that survey is obliterated, lands affected on resurvey are, “practically speaking, unsurveyed land,” and must be segregated to protect existing rights. *United States v. State of Wyoming*, 195 F. Supp. 692, 698 (D. Wyo. 1961), citing *Cox v. Hart*, *supra*.

No evidence of Foreman’s 1871 survey was found by Blout anywhere in the township, and the limited resurvey record submitted by BLM does not show he considered any bona fide rights in 1924. Nor does that record show GLO did so when it approved his field notes, filed his resurvey plat, or accepted his boundaries as properly marked under the 1909 Act. Notwithstanding the dearth of record evidence regarding that resurvey, *see* n.2, *supra*, GLO might have considered Chiantaretto’s and other settlers’ bona fide rights. To the extent such evidence exists, it should have been considered in any “detailed investigation” of the Routsons’ request for patent correction based on resurvey error. BLM is the sole custodian of the resurvey record and that evidence, which it inexplicably failed to provide to the Board.

Chiantaretto made entry under an 1871 survey, but since no evidence of that survey remained in 1924, it was an “historical event” that ceased to exist as a “tangible, present fact” and necessitated a resurvey “to re-establish the status of the area over which it had extended as surveyed lands of the United States.” *Cox v. Hart*, 260 U.S. at 438. Had Blout’s resurvey included “the usual tract segregations for valid or patented entries,” Chiantaretto’s rights would have been protected under the 1909 Act when Blout established new section lines and corners, as he was required to do by the 1902 Manual of Survey. *Cf.*, *U.S. v. Reimann*, 504 F.2d at 137. This is the gravamen of the Routsons’

¹¹ The majority takes a very different view by assuming Blout “restored” section lines and corners in their true and original locations and therefore protected Chiantaretto’s rights in the lands described by his patent, as later depicted on Blout’s Plat of Resurvey. 179 IBLA at 196 n.12. While generally true for dependent resurveys performed under the 1930 (or more recent) survey manuals, Blout’s resurvey was executed under a fundamentally different legal regime pursuant to the 1902 Manual of Survey and Circular 520. It is that substantial and substantive difference (not just in nomenclature or procedure) which compels me to address this issue in dissent.

claim of resurvey error, which BLM (and the majority) disregard by deeming Blout's resurvey "dependent" and applying Board precedent applicable to dependent resurveys.¹² As I find that view misplaced in fact, law, and logic, I would either reverse or set aside BLM's decision based on Blout's resurvey and GLO's approval of that resurvey.

II. BLM's STATED RATIONALE LACKS A RATIONAL BASIS.

Central to BLM's rationale for rejecting the Routsons' request for patent correction is its assumption that Chiantaretto knew (or should have known) his patented homestead was misdescribed. Decision at 3. More than assumed knowledge is required in weighing the equities before correcting a patent error; no less should be necessary in determining whether the entryman erred in describing the lands he earned when patent issued. See *Leverich*, 177 IBLA at 62 (GLO recognized the entrymen could not ascertain their boundaries due to topographical difficulties); *Ramona & Boyd Lawson (Lawson)*, 159 IBLA 184, 198, 199 (2003) (rejecting claim of prior knowledge by heirs because the evidence did not "conclusively" demonstrate they knew their home was not on the patented tract; *Mantle Ranch*, 47 IBLA at 23 (with only one observable corner and "extremely rugged terrain along this section line, for a layman it would be a pure guess to identify its true location").

Without any evidentiary support in the record, BLM presumed from Chiantaretto's failure to seek an amended or additional entry that he agreed with Blout's 1924 resurvey and that his patent correctly described the lands he had cultivated or intended to cultivate in 1916 (or stated in the obverse, that he knew and agreed that the lands he was then cultivating were properly excluded from his patent). Answer at 3. Rather than show he knew and agreed he was cultivating Forest Service lands, I find Chiantaretto's failure to act demonstrates he was *unaware* his cultivated fields were not included in his patent,¹³ because to hold otherwise would be "to impugn his sanity" or suggest he was

¹² I do not believe it is appropriate to impose burdens based on precedent applicable only to dependent resurveys under the circumstances of this of case (e.g., to show that fencing was erected in reliance on original survey monuments or that the original survey was fictitious or fraudulent). See 179 IBLA at 197-98, 200-01, 202, citing *Tracy V. Rylee*, 174 IBLA at 250-51 and other cases.

¹³ As discussed *supra*, Chiantaretto was allowed additional entry to 20 acres after he was assisted by an attorney. Having retained counsel to make that entry less than 10 years earlier, it is illogical to presume (or even suggest) Chiantaretto would knowingly cultivate lands that were not patented to him without then taking similar action (e.g., to submit a new application for entry, a second additional entry, or an amended entry to the full 160 acres permitted by law).

incredibly ill-informed. *Mantle Ranch Corp.*, 47 IBLA 17, 33 (1980); see *Hancock*, 150 IBLA at 352. Absent at least some evidence of personal knowledge by Chiantaretto, I find any negligent failure to act during the mid-to-late 1920s is legally and logically irrelevant in determining whether he misdescribed the lands he actually earned when making his final proofs for patent in 1916.¹⁴

While inaction may be considered in determining whether equity and justice favor patent correction, we have never before held (or even suggested) that a failure to act constitutes evidence no error was made when patent issued. See *Lawson*, 159 IBLA at 199-200; *Hancock*, 150 IBLA at 348-49, 351, 352; *Snow*, 79 IBLA at 264-65. Since a failure to survey or locate original survey monuments does not affect a finding of patent error, I am at a loss to understand how a negligent failure to seek corrective relief 10 or more years after the fact is (or could be) probative on whether a good faith error was made when patent issued in 1916, as does the majority.¹⁵ See 179 IBLA at 192, 197, 201-02.

Since the assumption and presumption upon which the Decision rests are unsupported in law and fact and any inaction by Chiantaretto is irrelevant to determine whether an error was made in 1916, BLM's decision should be aside for its lack of a

¹⁴ An extended delay in taking action is relevant in assessing the equities and determining whether patent correction is warranted and appropriate, not only by the entryman, but also by the Government to enforce its rights. *Lawson*, 159 IBLA at 200 (20-year delay in pursuing relief by the entryman's heirs counterbalanced by 75-year delay in the Department and Forest Service failing to act); see *Foust v. Lujan*, 942 F.2d 712, 717 (10th Cir. 1991) ("failure to take some action against the alleged trespass for nearly forty years is a relevant consideration in evaluating the equities of the case"). The Forest Service had the Plat of Resurvey for over 75 years before it finally acted on the Chiantaretto/Routson agricultural trespass.

¹⁵ Any imputed negligence goes to the equities and whether patent correction is "warranted and appropriate," unless one presumes, as BLM did, that a failure to seek corrective relief shows Chiantaretto knew and agreed in 1924 that he was cultivating land he had neither entered nor intended to enter during 1916. It is that presumption (based on assumed knowledge) that I find improper and why I believe there must be at least some evidence of actual knowledge before making that presumption. Without that, the majority is effectively empowering BLM to reject patent corrections due simply to the passage of time, a proposition this Board has rejected. Thus, I find a negligent failure to act irrelevant to whether an error was made, see 179 IBLA at 200, 202, unless the majority is equally willing to presume from Forest Service inaction that it believed Chiantaretto, his son, and the Routsons were acting in the reasonable and good faith belief that their farm was on patented land for over 70 years.

rational basis. *See, e.g., Wyoming Outdoor Council*, 170 IBLA 130, 144 (2006) and cases cited (“BLM must ensure that its decision is supported by a rational basis, which must be stated in the decision as well as being demonstrated in the administrative record accompanying the decision.”).

III. *THE WEIGHT OF THE EVIDENCE SHOWS CHIANTARETTO ERRED IN DESCRIBING THE LANDS HE EARNED UNDER THE HOMESTEAD LAWS.*

Notwithstanding the total lack of any original survey monuments or other on-the-ground evidence of that survey and Blout’s establishing new corners and section lines at proportionate distance under the 1902 Manual of Survey, BLM deems and the majority finds he executed a “dependent” resurvey which properly restored corners and section lines in their true, original locations, and by doing so protected Chiantaretto’s bona fide rights under the 1909 Act. Based on that legal fiction, they apply Chiantaretto’s legal description to the Plat of Resurvey and conclude he had not misdescribed the lands he had cultivated or intended to cultivate and earn in 1916. As discussed, Blout’s resurvey was an “independent resurvey” in fact and law (*i.e.*, obliteration of original survey evidence was total and complete and few disposals of the public lands (nine settlers then in the township)), and he should then have segregated tracts to protect the rights of entrymen and patentees and avoid impairment under the 1909 Act. *See* Circular No. 520; *Cox v. Hart, supra*; *U.S. v. Wyoming, supra*; *cf., U.S. v. Reimann, supra*. To give controlling weight to his resurvey is to ignore the record and create new law potentially inconsistent with Supreme Court precedent. Rather than go down that road, I would give that resurvey no weight in deciding whether a patent error occurred in 1916. *See* discussion, *supra*. Nonetheless and even assuming Blout performed a “dependent” resurvey, conducted a “full investigation,” reestablished section lines and corners in their true and original locations, and protected rights under the 1909 Act, I find the clear weight of the evidence shows Chiantaretto earned more or different land than identified by the four corners of his patent’s legal description, as depicted on Blout’s Plat of Resurvey. *See Elmer L. Lowe*, 80 IBLA at 105.

BLM recognizes and the majority concedes that a correctable error occurs when a patent and application for entry describe the same lands, “but the description does not match the land entered or intended to be entered on the ground.” *Id.* ; *see* Answer at 4-5; 179 IBLA at 194. Cultivated lands and those on which improvements are erected are clearly and obviously entered and necessary to support patent issuance. *See Hancock*, 150 IBLA at 351 (“an entryman would not complete his legally-required improvements on lands and then apply for other lands”). Adjacent lands are also included in a corrected patent if the entryman intended to enter them. *See Lawson*, 159 IBLA at 191 (intent to enter adjacent land found because “it would encompass the optimum amount of arable land”); *Arthur Warren Jones*, 97 IBLA 253, 256 (1987) (adjacent homestead constituted “persuasive evidence” the patentee “intended to enter the disputed land”). Thus, the issue on which I and the majority disagree is whether the Routsons

preponderated in showing that Chiantaretto entered or intended to enter by cultivating and earning the lands in dispute.

The Routsons rely primarily on the cornfield identified by Blout to show Chiantaretto misdescribed the lands he entered, cultivated, and earned under the homestead laws. SOR at 3 (Disputed Land B and part of Disputed Land A). In addition, they aver the fenced lands north of that cornfield were also earned by Chiantaretto. *Id.* at 2 (the remainder of Disputed Land A). Although a fenced cornfield in the southwest portion of Chiantaretto's homestead was observed by GLO surveyors in 1924 and his final proofs were that he was cultivating 60 acres of corn and potatoes in the south part of his homestead and had enclosed his entry with 3-wire fencing, BLM claims "there is no evidence the entryman had cultivated these fields at the time he applied for the Patent" and the majority finds "[t]here are no objective facts in the record from which we can conclude that the evidence of cultivation Blout observed in 1924 reflected circumstances as they might have existed in 1913 or in 1916, or that such evidence demonstrates an intention on Chiantaretto's part to enter and homestead lands different from those he described and to which he received patent." Answer at 7; 179 IBLA at 201-02; *see id.* at 22 ("these circumstances do not even hint at a correctable mutual mistake of fact"). I disagree.

Chiantaretto entered lands in the Prescott National Forest that were "chiefly valuable for agricultural purposes," as determined by the Secretary of Agriculture, and earned patent by cultivating corn and potatoes on 60 acres in the south part of his homestead and by fencing 145 acres, as demonstrated by final proofs made in 1916. Blout noted and the Plat of Resurvey shows that the only land in the vicinity of Chiantaretto's entry residence with good soil for growing crops was along a wash in the southwest portion of his homestead where his cornfield was observed in 1924. Moreover, Blout's resurvey also shows that over half of Chiantaretto's patented lands were either unfit for cultivation or had not been cultivated (*i.e.*, over 40 acres in E $\frac{1}{2}$ SE $\frac{1}{4}$, sec. 22, are on the slope of a mesa and the remainder of that eighth section was covered by juniper trees, underbrush, and the road to Prescott). *See* Plat of Resurvey. In addition, Chiantaretto's patent describes his lands as being in an ascending stair-step that conforms with the sinuosities of the wash near his residence, one of the few areas in the township with first rate soils capable of providing good crops. *See* Blout Field Notes at 79; Plat of Resurvey. Although this shape was obviously intended to embrace good farm land along that wash, Blout's resurvey placed most of those bottom lands adjacent to but outside the lands patented to Chiantaretto. Here, as in *Lawson*,¹⁶ the unique

¹⁶ We there found a correctable error where tillable land "along the river bottom" was excluded on resurvey because the entryman's stair-step entry and patent followed the
(continued...)

configuration of his patented lands further supports the conclusion that Chiantaretto cultivated lands along the wash bisecting his cornfield in the good faith belief they were properly included and described in his patent.

Since the GLO resurvey and plat show a fenced cornfield under cultivation in 1924 with no other settlers in the immediate area, there can be no question but that Chiantaretto was then farming that cornfield. *But see* 179 IBLA at 198-99 (asserting there is “no evidence that [Chiantaretto] . . . actually cultivated” the cornfield or other fenced lands to the north and east). An entryman earns the lands he had entered or intended to enter at the time patent issued. Recognizing that an entryman will not expend his efforts cultivating certain lands and then seek patent to other lands, I infer that the lands observed by GLO in 1924 were either cultivated by Chiantaretto in 1916 or that he then intended to cultivate them. It is not just the fact that a fenced cornfield was observed by Blout in 1924, but also its consistency with the Chiantaretto’s unusually specific final proofs as to where (south part of homestead), what (corn and potatoes), and how much land he was then cultivating (60 of 140 acres), the unique shape of his patented lands (*i.e.*, a stair-step that follows good soils along a wash), and the fact that 80 of his 140-acre patent were neither cultivated nor susceptible to cultivation that compel me to conclude that the weight of the evidence shows the Routsons preponderated in showing patent error.¹⁷

The majority finds the Routsons failed to carry their burden because Chiantaretto’s cornfield could have been newly planted, he might have intended to cultivate and earn less or different land, or could have been engaged in an innocent trespass. We have never before required applicants or appellants to dispel all other possibilities before finding a patent error. *See, e.g., Leverich, supra; Lawson, supra; Hancock, supra; Snow, supra.* While the majority would do so here, I would not.

In my view, the record evidence collectively points in one consistent direction and is no less persuasive than the remains of a cabin that might have been occupied on entry

¹⁶ (...continued)

river’s sinuosities and showed an intent to enter “the greatest amount of tillable bottom land possible while conforming to the public-land survey system.” 159 IBLA at 186, 193-94.

¹⁷ The Routsons also seek to include lands north of the cornfield in a corrected patent, but the facts concerning those lands are less clear because, unlike the cornfield noted by Blout, there is no evidence corroborating the Routsons’ averment that this field was fenced and farmed by Chiantaretto. Nonetheless, if they were under cultivation in 1924, they should have been segregated to protect his bona fide rights. *See discussion, supra.*

60-100 years earlier, as in *Lawson* or *Leverich*. If the law is to be consistently applied, the majority's conclusion that no error was demonstrated by this record would be to require future applicants to present either some evidence of a cabin or clear and convincing evidence that the disputed lands were under cultivation at the time patent issued, a standard we have rejected in favor of "by a preponderance of the evidence." By applying the homestead laws and the preponderance standard to the facts of record, I find the clear weight of the evidence and reasonable inferences drawn from those facts show that Chiantaretto erred in his legal description for patent by omitting lands he actually earned under the homestead laws.

For the foregoing reasons, I must respectfully dissent.

/s/

James K. Jackson
Administrative Judge